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Revolutionary or Aberrational?: The Status of the Supreme Court's Recent Federalism Cases in the Eighth Circuit

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**REVOLUTIONARY OR ABERRATIONAL?: THE STATUS OF THE
SUPREME COURT'S RECENT FEDERALISM CASES IN THE
EIGHTH CIRCUIT**

CRISTIAN M. STEVENS*

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I. INTRODUCTION

Some well-known and respected commentators recently have criticized Congress for enacting statutes that, in their opinion, exceed Congress' delegated powers and invade traditional spheres of state regulation. In the wake of such criticism, some commentators have heralded the recent United States Supreme Court decisions in *New York v. United States*, *United States v. Lopez*, *Seminole Tribe v. Florida*, *City of Boerne v. Flores*, and *Printz v. United States*, each of which strikes down an Act of Congress on some constitutional basis, as fundamentally shifting the federal balance of power in favor of the states. Others are of the opinion that the narrow holdings of these cases have little to say about the general relationship between the federal government and the states and, therefore, will have little effect on that relationship. Not coincidentally, the remarkable split in the commentary almost invariably divides along the lines of those who agree that the cases reflect sound constitutional principles and those who believe the cases declare flawed public policy.

This Article evaluates the impact of the above Supreme Court cases by collecting the decisions of the United States Court of Appeals for the Eighth Circuit that apply the cases. Based upon the Eighth Circuit's receptiveness to litigants' arguments predicated on the Supreme Court cases, this Article draws conclusions regarding the degree to which the cases have realized the expectations of their proponents or the stark predictions of their critics. The goal is to determine authoritatively whether, putting to one side their highly disputed merits, the cases truly represent a revolution in federalism jurisprudence or merely are aberrations destined to be ignored in most cases.

A. *Criticism of Congressional Acts*

Respected scholars, popular commentators, and even the Chief Justice of the United States, recently have expressed concerns about congressional Acts "federalizing" entire areas of law traditionally thought to be reserved for state regulation, "commandeering" state resources and officers for the advancement of federal policies, or subjecting states to private causes of action in federal court.¹ The fundamental criticism is that Congress, by enacting these statutes, has exceeded its delegated powers and has encroached upon the residual sovereignty of the states, thus damaging the system of dual sovereignty established in the United States Constitution.

A prominent expositor of this view, former United States Attorney General Edwin Meese III, repeatedly has criticized Congress for the rapid increase in the number of criminal offenses in the United States Code that duplicate existing state crimes. In his capacity as chairman of an American Bar Association task force studying the federalization of criminal law, Meese lamented that federal crimes, many of which prohibit and punish conduct local in nature, now number in the thousands.² The growing number of federal

1. *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1038-47 (1995).

2. *See* Edwin Meese, III, *The Dangerous Federalization of Crime*, WALL ST. J., Feb. 22, 1999, at A19 ("Today there are more than 3,000 federal crimes on the books. Hardly any crime, no matter how local in nature, is beyond the jurisdiction of federal law enforcement authorities."); *see also* Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 3 (1997) ("[T]here are well over 3,000 federal crimes today. And this number does not include the 10,000 regulatory requirements that carry criminal penalties. Few crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction."). Some of the examples Meese cited are: the Anti-Car Theft Act, 18 U.S.C.A. § 2119 (West Supp. 1999) (prohibiting carjacking); the Child Support Recovery Act, 18 U.S.C.A. § 228 (West Supp. 1999) (prohibiting failure to pay child support); the Church Arson Prevention Act, 18 U.S.C.A. § 247 (West Supp. 1999) (prohibiting burning or damaging church property); the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994) (prohibiting blocking an abortion clinic); the Gun-Free School Zones Act, 18 U.S.C.A. § 922 (West Supp. 1999) (prohibiting possession of a handgun near a school). *See* Meese, TEX. REV. L. & POL., *supra*, at 3-5.

offenses is particularly alarming, according to Meese, when one considers the “startling fact that more than 40% of the federal criminal provisions enacted since the Civil War became law in just the last three decades.”³ Meese’s basic concern, as expressed at a symposium on the role of the federal judiciary, is that “the federalization of crimes that traditionally have concerned state and local governments upsets the balance between the national government and the states.”⁴

In many ways, the opinions of the former attorney general parallel the concerns expressed for years by Chief Justice William H. Rehnquist.⁵ Since as early as 1991, Chief Justice Rehnquist consistently has stressed, in his annual *Year-End Report of the Federal Judiciary*, the importance of a proper balance between federal and state court jurisdiction and has requested that Congress restrain itself when considering the addition of new crimes to the United States Code.⁶ Regarding the substantial increase in federal criminal cases in 1997,⁷ Chief Justice Rehnquist explained that “[m]any factors have produced this

3. Meese, WALL ST. J., *supra* note 3, at A19; *see also Meese Task Force Reports on Laws*, LAS VEGAS REV. J., Feb. 16, 1999, at 5A (“A task force chaired by former Attorney General Edwin Meese III . . . notes with alarm that more than 40 percent of all federal criminal laws enacted since the Civil War were passed since 1970.”).

4. Edwin Meese, III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 793 (1998).

5. *See* Meese, WALL ST. J., *supra* note 3, at A19 (“The ABA report, backed up by extensive statistical data, supports the position of Chief Justice William Rehnquist, who deplored the expanded federalization of crime in his annual report on the federal judiciary last December”); LAS VEGAS REV. J., *supra* note 3, at 5A (“The ‘Federalization of Criminal Law’ report mirrors criticism raised by Chief Justice William H. Rehnquist in his year-end report on the federal judiciary in December.”).

6. *See* William H. Rehnquist, *The 1991 Year-End Report of the Federal Judiciary*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington D.C.), Jan. 1992, at 2-3:

In attaining [jurisdictional] balance, we cannot overlook . . . the federal courts’ limited role reserved for issues where important national interests predominate Modest curtailment of federal jurisdiction is important; equally important is self-restraint in adding new federal causes of action. New additions should not be made unless critical to meeting important national interests

Id.; *see also* William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1660 (1992) (“Those of you who have read my Annual Report on the Judiciary know what I have been saying about the recent tendency to federalize crimes for essentially political reasons without recognizing the impact federalization would have on the federal courts.”).

7. The increase in criminal cases “produc[ed] the largest federal criminal caseload in 60 years.” William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary* [hereinafter *1997 Judiciary Report*], THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Jan. 1998, at 2; *see also* 1997 Jud. Bus. U.S. Cts. 19-20, 178 (Table D) (“In 1997, filings of both criminal cases and defendants rose to their highest levels since 1933, the year the Prohibition Amendment was repealed. Case filings grew 5 percent to 50,363, which caused filings per authorized judgeship to increase from 74 to 78 cases.”).

upward spiral, including laws enacted by Congress that expand federal jurisdiction over crimes involving drugs and firearms.”⁸ Chief Justice Rehnquist admonished Congress to consider carefully the impact of the increased caseload on the federal courts before further expanding federal jurisdiction. He then reiterated the federal judiciary’s “long-standing position that federal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts.”⁹

In his 1998 year-end report, Chief Justice Rehnquist delivered the most severe, and prominently reported,¹⁰ rebuke to date of Congress’ continuing penchant for federalizing crimes traditionally prosecuted in state courts.¹¹ He warned that the current trend “threatens to change entirely the nature of our federal system.”¹² Federal courts, he stated, were not meant to deal with local crimes, and because state courts are capable of handling such crimes, the federal courts should not be expected to do so.¹³

8. Rehnquist, *1997 Judiciary Report*, *supra* note 7, at 2.

9. *Id.*

10. Numerous widely-circulated newspapers publicized Chief Justice Rehnquist’s remarks and excerpted them at length. *See, e.g., Making a Federal Case Out of It*, N.Y. POST, Jan. 5, 1999, at 24; Aaron Epstein, *Rehnquist Rips Congress for Neglecting U.S. Courts*, ARIZ. REPUBLIC, Jan. 2, 1999, at A2; *Rehnquist Report Assails Glut of Federal Offenses*, CHI. TRIB., Jan. 1, 1999, at 3.

11. *See* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* [1998 *Judiciary Report*], THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Jan. 1999, at 2.

As examples of the recent trend “to federalize crimes already covered by state laws,” Chief Justice Rehnquist listed: the Anti-Car Theft Act, 18 U.S.C.A. § 2119 (West Supp. 1999) (prohibiting carjacking); the Child Support Recovery Act, 18 U.S.C.A. § 228 (West Supp. 1999) (prohibiting failure to pay child support); the Animal Enterprise Protection Act, 18 U.S.C.A. § 43 (West Supp. 1999) (prohibiting stealing, damaging, or causing the loss of any property of an animal research facility, zoo, circus or other “animal enterprise”); the Church Arson Prevention Act, 18 U.S.C.A. § 247 (West Supp. 1999) (prohibiting burning or damaging church property). Rehnquist, *1998 Judiciary Report*, *supra*, at 2. *See also* Rehnquist, VA. L. REV., *supra* note 6, at 1660 (describing the Violence Against Women Act as “creat[ing] new federal crimes[.] . . . an ill-defined new civil cause of action . . . [and] needless friction and duplication among the state and federal systems”).

12. Rehnquist, *1998 Judiciary Report*, *supra* note 11, at 2.

13. *See id.* (“Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems.”); *see also* William H. Rehnquist, *Seen In a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 5 (1993) (“Federal courts were intended to complement state court systems, not supplant them. And federal courts were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not.”).

For additional criticism of the federalization of crime by other prominent leaders, *see, e.g.,* 26 WEEKLY COMP. PRES. DOC. 1944-45 (Nov. 29, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6696-1 (President Bush); Lorie Hearn, *Trying Times Are Ahead: Justice O’Connor Says Federalization of Crime Could Overwhelm the Courts*, SAN DIEGO UNION TRIB., Aug. 17, 1994,

Less prominent in the popular media, but equally prevalent in legal journals and law reviews, has been commentary regarding Congress' propensity for "commandeering" the administrative and regulatory bureaucracies of the states. For example, Professor Caminker, in a 1995 article, reported that Congress has enacted numerous statutes in the past decade that treat the states as departments of the federal government.¹⁴ He stated that, "[r]ather than regulate private behavior directly, the statutes order state governments to issue or enforce regulations on private behavior according to Congress's direction."¹⁵ As Professor Caminker explained, the statutes create resentment among state officials because they require that scarce state resources be diverted to advance federal purposes, instead of being allocated to meet local demands.¹⁶

Professor Hills argued, in a more recent article, that commandeering amounts to "pointless centralization" of governmental power because it sacrifices federalism's advantages to achieve ends that are just as easily reached by paying the states for the use of their regulatory bureaucracies.¹⁷ Commandeering also diminishes state revenue and the policymaking discretion of state officers.¹⁸ "[S]uch erosion of the power, money, and prestige of nonfederal offices can only reduce the incentive of voters and politicians to

at A1 (Justice O'Connor); *FBI Chief Says New Laws Strain Bureau*, S.F. CHRON., Dec. 9, 1993, at A16 (FBI Director Louis J. Freeh).

14. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUMBIA L. REV. 1001, 1002 (1995). As examples of such commandeering, Professor Caminker cited to the Low-Level Radioactive Waste Policy Amendments Act and to the Brady Handgun Violence Protection Act. *Id.* at 1002, 1009-10. See generally 42 U.S.C. § 2021(b)-(j) (1988) (making each state responsible for the disposal of low-level radioactive waste generated within its borders); 18 U.S.C. §§ 922, 924, 925A (1994) (requiring that state law enforcement officers make a "reasonable effort" to determine if proposed gun sales comply with local, state, and federal law).

15. Caminker, *supra* note 14, at 1002.

16. See *id.* at 1003; see also Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741, 766 (1997):

[I]f the federal government requires employees of the DMV to register voters, those employees are thereby diverted from some other task, e.g., programs to deter drunk driving; if local police are required to implement the Brady Bill, they too are deflected from some other activity, e.g., street patrols. To preserve those other activities, state and local officials must divert resources from other programs or must raise taxes, in effect levying state and local taxpayers to pay for federally-mandated programs.

Id.

17. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 857 (1998). See also Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 185 (1998) ("[N]on-federal governments have the capacity to bargain hard for more implementing discretion or more federal money, or both, when they enlist to implement federal programs.").

18. See Hills, MICH. L. REV., *supra* note 17, at 894-95.

expend time, energy, and money in voting, running for office, monitoring representatives, and otherwise engaging in political activities. . . .”¹⁹ Furthermore, commandeering unfairly allocates the costs of federal programs to the states, forcing states to cut nonmandated services that are not favored by Congress, even though they may be of interest to local constituents.²⁰ Finally, Professor Hills argued that commandeering often forces state politicians to advance federal policies with which they disagree, and that such “forced association” undermines political accountability,²¹ decreases political pluralism,²² and degrades the integrity of state officers.²³

Professor Light, limiting his discussion of commandeering to the arena of environmental regulation, commented on the emergence in the late 1960s and early 1970s of environmental statutes “designed to utilize state administration and enforcement mechanisms in the implementation of federal regulatory regimes.”²⁴ To ensure efficient implementation by the states, most of the environmental statutes provide economic incentives, threaten partial preemption of state law, or impose regulatory requirements that are also generally applicable to private entities.²⁵ Some of the statutes, however, comprise “direct orders” compelling state legislatures to enact, and state executive agencies to enforce, federal programs at the threat of civil and criminal penalties for noncompliance.²⁶ Professor Light criticized such

19. *Id.* at 895.

20. *Id.* at 901-04; *see also* Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1194 (1998) (“Whatever time and money states must expend to enact or administer federal regulatory programs necessarily diminishes their ability to adopt and implement state regulatory programs.”).

21. Hills, MICH. L. REV., *supra* note 17, at 906-07; *see also* Hills, HARV. J.L. & PUB. POL’Y., *supra* note 17, at 192 (“If Congress could force state and local governments to carry out federal programs, then Congress could also bar governors and mayors from interfering with state and local agencies’ efforts to enforce federal law.”).

22. *See* Hills, MICH. L. REV., *supra* note 17, at 911.

23. *Id.* at 911-12.

24. Alfred R. Light, *He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law*, 4 ENVTL. L. 779, 782 (1998). Regarding the recent vintage of federal environmental regulation, Professor Light stated, “[t]he high degree of federal participation exercised in environmental law today is only a recent phenomenon. Until the late 1960s, environmental regulation was considered primarily the domain of states and municipalities. In response to public outcry, however, Congress waxed prolific in the area of environmental protection.” *Id.*

25. *See* Light, *supra* note 24, at 798-99, 804, 813.

26. *Id.* at 800-04. *See generally* the Clean Water Act, 33 U.S.C. § 1319(c) (1994) (establishing criminal penalties for negligent and knowing violations of certain substantive sections of the Act); the Lead Contamination Control Act, 42 U.S.C. § 300j-24 (1994) (requiring that states disseminate information compiled by the EPA and establish lead contamination remedial programs); the Emergency Planning and Community Right-To-Know-Act, 42 U.S.C. §§ 11001(a) and 11046(a)(1)(C)-(D) (1994) (requiring that the governor of each state establish an “emergency response commission” and creating civil liability for noncompliance with other

mandates on the familiar grounds that they “commandeer[] the states’ police power . . . [and] erode political accountability.”²⁷

Finally, Professor Light also was skeptical of federal statutes that provide for citizen enforcement actions against violators of environmental regulations.²⁸ Such enforcement provisions, though they appear innocuous enough at first blush, may raise federalism concerns when the alleged violator happens to be a state official or agency. Professor Light doubted that, in the event such a case should arise, Congress would have the power to abrogate the states’ Eleventh Amendment immunity to suit in federal court to enforce federal environmental regulations promulgated under the Commerce Clause.²⁹ “[T]he Eleventh Amendment could conceivably bar citizen claims against states . . . , even when the state is part of the regulated community along with private parties.”³⁰

B. *Commentary on the Significance of the Supreme Court’s Recent Federalism Cases*

In the context of the wide-ranging criticism that Congress, by enacting statutes like the Freedom of Access to Clinic Entrances Act, the Brady Handgun Violence Prevention Act, and the Clean Air Act, has overreached its boundaries and encroached upon spheres of state regulation, some commentators, and judges alike, have acclaimed the recent decisions of the United States Supreme Court in *New York v. United States*,³¹ *United States v. Lopez*,³² *Seminole Tribe v. Florida*,³³ *City of Boerne v. Flores*,³⁴ and *Printz v.*

provision of the Act); the Solid Waste Disposal Act, 42 U.S.C. §§ 6991a(b)-(c) and 6972(a)(1)(A) (1994) (requiring that the governor of each state designate a state agency to inventory underground storage tanks for submission to the EPA, and creating civil liability for failure to do so).

27. Light, *supra* note 24, at 800.

28. See *id.* at 806. Professor Light cited the Clean Air Act, 42 U.S.C. § 7604 (1994) (creating a civil cause of action against any person, including “the United States, and . . . any other government instrumentality or agency,” for violation of the Act) and the Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994) (creating a civil cause of action against any person, including “the United States, and . . . any other government instrumentality or agency,” for violation of the Act).

29. See Light, *supra* note 24, at 809; see also William E. Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts*, 25 J.C. & U.L. 501, 502, 518 (1999) (criticizing Congress’ regular abrogation of the Eleventh Amendment allowing private parties to “enforce virtually all federal statutory rights against the States in federal courts.”).

30. Light, *supra* note 24, at 810.

31. 505 U.S. 144 (1992) (holding that the “take-title” provision of the Low-Level Radioactive Waste Policy Amendments Act is beyond the Article I powers of Congress and, therefore, is a violation of the Tenth Amendment).

32. 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeds the power of Congress to regulate interstate commerce under the Commerce Clause).

*United States*³⁵ as the first steps toward a federal system of government in which the reserved sovereignty of the states is respected and the limits of congressional power are enforced.³⁶

33. 517 U.S. 44 (1996) (holding that Congress does not have the power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity to suit in federal court, as it purported to do in the Indian Gaming Regulatory Act).

34. 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act exceeds Congress' enforcement power under § 5 of the Fourteenth Amendment).

35. 521 U.S. 898 (1997) (holding that the background-check provision of the Brady Handgun Violence Prevention Act exceeds Congress' Article I power and is inconsistent with the constitutional systems of federalism and separation of powers).

36. Other cases often included in this category of recent federalism cases are the following: *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (holding the *Ex parte Young* exception to Eleventh Amendment immunity did not apply to a suit amounting to a quiet title action brought by an Indian tribe against state officers); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that a federal district court's desegregation orders requiring Missouri to fund salary increases and remedial education are beyond its remedial capacity); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) (arguing, for a four-justice minority, that the Tenth Amendment reserves to the people of Arkansas the power to amend their state constitution to impose term limits on U.S. senators and congressmen from Arkansas); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding the Missouri Constitution's mandatory retirement age for state judges does not violate the Age Discrimination in Employment Act or the Equal Protection Clause of the Fourteenth Amendment). See, e.g., Alex Kozinski, *Introduction: Constitutional Federalism Reborn*, HARV. J.L. & PUB. POL'Y. 93 (1998) (discussing *Coeur d'Alene*); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997) (discussing *Jenkins* and *U.S. Term Limits*); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 621, 623-25 (1995) (discussing *U.S. Term Limits* and *Gregory*); Richard C. Reuben, *Court Bolsters 10th Amendment*, ABA J., April 1995, at 78-79 (discussing *Gregory*). These cases, however, are not circumstances in which the Supreme Court struck down congressional legislation as exceeding congressional power and encroaching on state sovereignty; therefore, they are outside the scope of this Article.

Three cases that cannot be excluded from the category of recent Supreme Court federalism cases are the following: *Alden v. Maine*, 119 S. Ct. 2240 (1999) (holding that Congress does not have the power under Article I to abrogate an unconsenting state's sovereign immunity to private suit for damages in state court); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act does not abrogate state sovereign immunity to suit in federal court because it is not appropriate remedial or preventive legislation under § 5 of the Fourteenth Amendment); and *College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999) (holding that the Trademark Remedy Clarification Act does not abrogate state sovereign immunity to suit in federal court because it was not enacted pursuant to Congress' enforcement power under § 5 of the Fourteenth Amendment; and overruling the constructive waiver doctrine of *Parden v. Terminal Railway*, 377 U.S. 184 (1964)). In *College Savings Bank v. Florida Prepaid Postsecondary Education*, the Court also overruled the constructive waiver doctrine allowing states to waive their Eleventh Amendment immunity without having expressed intent to do so. *Id.*

Likewise, the Eighth Circuit, relying on *Alden* and the *Florida Prepaid* cases, decided in *Bradley v. Arkansas Department of Education* that Congress unequivocally expressed its intent to

For example, in a paper submitted to a 1995 academic symposium on *Lopez*, Professor Calabresi characterized the *Lopez* Court's decision to strike down the Gun-Free Schools Zones Act³⁷ as an "extraordinary event" and endorsed *Lopez* as a "revolutionary . . . revival" of the fundamental constitutional principle that the powers of the federal government are enumerated and limited.³⁸ "Even if *Lopez* produces no progeny and is soon overruled, the opinion has shattered forever the notion that, after fifty years of Commerce Clause precedent, we can never go back to the days of limited national power."³⁹ Indeed, according to Professor Calabresi, *Lopez* may prove to be a seminal Commerce Clause case of the same magnitude as *NLRB v. Jones & Laughlin Steel Corp.*⁴⁰ and *United States v. Darby*.⁴¹ In conclusion, Professor Calabresi dismissed the "gnashing of teeth among law professors"⁴² in response to *Lopez* and derided the conventional wisdom that *Lopez* is a fleeting departure from the standard Commerce Clause jurisprudence.⁴³ He encouraged the Court to pursue the path it undertook in *Lopez* and exhorted other commentators to do the same.⁴⁴

abrogate Eleventh Amendment immunity in the IDEA and § 504 of the Rehabilitation Act, but that the abrogation exceeded Congress' § 5 enforcement power. See 189 F.3d 745, 750-51, 752 (8th Cir. 1999). The Eighth Circuit has since granted rehearing en banc on the portion of the decision dealing with § 504. See *Jim C. v. Arkansas Dep't of Educ.*, 197 F.3d 958 (8th Cir. 1999) (order granting rehearing en banc).

37. See 18 U.S.C. § 922(q) (1994) (prohibiting possession of a handgun near a school).

38. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995) [hereinafter Calabresi, A Government of Limited and Enumerated Powers or Calabresi, MICH. L. REV.]; see also Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1379-80 (1998) [hereinafter Calabresi, *Textualism*]:

[With] decisions such as *City of Boerne v. Flores*, *Printz v. United States*, *Seminole Tribe v. Florida*, *United States v. Lopez*, [and] *New York v. United States*, . . . it can fairly be said that the U.S. Supreme Court is again policing textually-provided-for structural jurisdictional lines in a way that has not occurred in this country since before 1937. This constitutional development is nothing less than a quiet revolution.

Id.

39. Calabresi, A Government of Limited and Enumerated Power, *supra* note 38, at 752.

40. 301 U.S. 1, 29-32 (1937) (holding the National Labor Relations Act may be construed as within Congress' Commerce Clause power to regulate acts directly burdening or obstructing interstate or foreign commerce).

41. See Calabresi, A Government of Limited & Enumerated Power, *supra* note 38, at 752. See also *Darby*, 312 U.S. 100, 114, 123-24 (1941) (holding that the Fair Labor Standards Act is a constitutional exercise of Congress' commerce power and does not violate the Tenth Amendment).

42. Calabresi, A Government of Limited & Enumerated Power, *supra* note 38, at 827.

43. See *id.* at 831.

44. See *id.* ("Those of us who comment on the Court's work, whether in law reviews or in the newspapers, should encourage the Court to follow the path on which it has now embarked."); see also Calabresi, *Textualism*, *supra* note 38, at 1385 ("[T]he increasing use of judicial review in

More recently, the United States Court of Appeals for the Fourth Circuit, in the course of striking down a portion of the Violence Against Women Act,⁴⁵ heralded *New York*, *Lopez*, *Seminole Tribe*, *City of Boerne*, and *Printz* as “the considered judgments of a Supreme Court that has incrementally, but jealously, enforced the structural limits on congressional power that inhere in Our Federalism.”⁴⁶ In a concurring opinion, Chief Judge James Harvie Wilkinson hailed the Supreme Court’s decision in *New York* as the beginning of an era of measured judicial activism seeking to revive the structural guarantees of federalism.⁴⁷ Chief Judge Wilkinson noted the post-*New York* “spate” of federalism cases handed down by the Supreme Court⁴⁸ and assessed their collective impact as “preserv[ing] Congress as an institution of broad but enumerated powers, and the states as entities having residual sovereign rights.”⁴⁹

Contrary to the opinions of Professor Calabresi and Chief Judge Wilkinson, some commentators persist in the sentiment that *New York*, *Lopez*, *Seminole Tribe*, *City of Boerne*, and *Printz* are aberrations and should be discounted accordingly. Harry Litman and Mark D. Greenberg, for example, did not see *Lopez* and *Seminole Tribe* as initiating a dramatic new approach to federalism issues.⁵⁰ They framed *Lopez*, not as a discourse on the proper federal balance of power, but as a narrowly drafted determination that the Gun-

structural constitutional cases . . . is a happy development which needs to be better understood and which we should all applaud.”).

45. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc) (holding that the Violence Against Women Act, 42 U.S.C. § 13981 (1994), was an unconstitutional exercise of Congress’ power under the Commerce Clause and the Enforcement Clause of Section 5 of the Fourteenth Amendment).

46. The Fourth Circuit rejected the “wistful assertions [of the defenders of the Act] that *United States v. Lopez* is an aberration of no significance and that the established precedents upon which *City of Boerne v. Flores* rested . . . should be disregarded as insufficiently ‘modern’ to define any longer the reach of Congress’ power under the Fourteenth Amendment.” *Id.* at 826. Regarding the appellants’ efforts to distinguish or discount *Lopez*, the Fourth Circuit stated, “[W]e are unwilling to consign the Supreme Court’s most significant recent pronouncement on the Commerce Clause to the status of inconvenient but ultimately insignificant aberration.” *Id.* at 854. Likewise, the Fourth Circuit defended the efficacy of *City of Boerne*, despite the appellants’ arguments to the contrary:

Ultimately, *City of Boerne* forcefully affirms that Congress’ power under Section 5 [of the Fourteenth Amendment] is not without limits, and that those limits are not simply theoretical or speculative, but are real and concrete, and are to be enforced by the courts, even at the expense of invalidating laudable and otherwise socially beneficial legislation.

Id. at 882.

47. See *id.* at 892-93 (Wilkinson, C.J., concurring).

48. *Id.* at 892 (citing *Printz*, *City of Boerne*, *Lopez*, and *Seminole Tribe*).

49. *Brzonkala*, 169 F.3d at 893 (Wilkinson, C.J., concurring).

50. See Litman & Greenberg, *supra* note 36, at 921-25.

Free School Zones Act exceeds Congress' commerce power.⁵¹ Litman and Greenberg concluded that, because *Lopez* admits of little occasion for application beyond its facts, it "will prove to have no more than a modest impact on the interpretation of the Commerce Clause and a negligible one on federalism jurisprudence."⁵²

Similarly, Professor Moulton opined in an April 1999 article that "the Court's current search for doctrine that would meaningfully promote federalism . . . has been a failure."⁵³ Professor Moulton characterized *New York*, *Printz*, and *Lopez* as a resurgence of judicially enforced federalism, which finds the Court "casting about" for ways to limit congressional power without regard to constitutional text, the historical record, Supreme Court precedent, or any practical benefit owing to federalism.⁵⁴ Professor Moulton argued that *New York* and *Printz* will prove ineffective in restraining Congress because, in those cases, the Court failed to "limit the reach of the Commerce Clause generally"⁵⁵ and left "the national government free to secure state implementation of national policy through . . . conditional spending and preemption."⁵⁶ Similarly, *Lopez*, in which the Court reaffirmed much of its post-New Deal precedent, "is unlikely to grow into more than a minor obstacle to a nearly omnipotent Congress"⁵⁷ and is best described as "one in a series of periodic reminders to Congress that its powers are not plenary."⁵⁸ Therefore, "while cases like *New York*, *Lopez*, and *Printz* may on occasion stimulate important debate, . . . they will never have more than the most marginal relevance to the allocation of decisions that matter most."⁵⁹

Other commentators, like Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, remain unsure of the impact of the recent

51. *See id.* at 925, 957-60.

52. Litman & Greenberg, *supra* note 36, at 977; *see also* Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 2, 10-12 (1997) (concluding that, in *Lopez* and *New York*, "[t]he Court has offered us an empty concern, a specter that the Court itself has no tools for capturing," because the Commerce Clause, the only Article I power with which *Lopez* dealt, is not the exclusive means by which Congress can federalize crime, and because the Tenth Amendment defines the powers reserved to the states only by reference to the powers not delegated to the federal government).

53. H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 851 (1999).

54. *Id.* at 852-56, 872-78, 889, 895.

55. *Id.* at 884. Professor Moulton likewise dismissed *City of Boerne* and *Seminole Tribe* as "federalism reminders in contexts other than the Commerce Clause and the Tenth Amendment." Moulton, *supra* note 53, at 884 n.234.

56. *Id.* at 895.

57. *Id.* at 896.

58. Moulton, *supra* note 53, at 890.

59. *Id.* at 924-25.

Supreme Court cases. At a March 1998 symposium on federalism, Judge Kozinski expressed his view that, with its recent decisions, the Supreme Court “has revitalized federalism.”⁶⁰ In *New York* and *Printz*, stated Judge Kozinski, the Court restored the Tenth Amendment as an enforceable limit on the power of Congress. In *Lopez*, the Court began to once again define the limits of Congress’ Commerce Clause power. In *Seminole Tribe*, the Court “gave new life to the Eleventh Amendment.”⁶¹ And in *City of Boerne*, the Court enforced the limits of Congress’ remedial power under the Fourteenth Amendment. Although Judge Kozinski was encouraged by each case as an expression of the Court’s view of federalism, he bemoaned the fact that the Court had been unable to articulate precise limits on the powers of Congress: “This inability leaves judges like me struggling with very little guidance to figure out what the limits of Congress power are.”⁶² Therefore, according to Judge Kozinski, it remains to be seen whether “the rebirth of federalism is a blip on the historical screen or if it is the beginning of something truly wonderful.”⁶³

C. Prospectus

Considering the widely divergent opinions on the significance of the Supreme Court’s recent federalism decisions, an empirical study of the actual impact of these decisions—whether they are in fact the remedy for Congress’ perceived overreaching or are mere aberrations—appears to be in order. Perhaps the best method for judging the impact of the decisions, the method chosen for the purposes of this Article, is to examine the case law of the United States circuit courts of appeals as they wrestle with the issues relegated to them for decision after the Supreme Court’s recent cases. It largely will be up to the circuit courts, as the final arbiters of federal law in the vast majority of cases,⁶⁴

60. Kozinski, *supra* note 36, at 93.

61. *Id.*

62. *Id.* at 94; see also Richard C. Reuben, *Finding the Right Target: Federalism is the Underlying Issue in Challenges to the Brady Act*, 83-Jan. ABA J. 44 (1997) (reporting that *New York* “has been cited frequently in subsequent challenges to a wide range of federal laws, but the lower courts have bogged down on the central question of [the meaning of that case]”).

63. Kozinski, *supra* note 36, at 94; see also Thro, *supra* note 29, at 501, 505, 525 (describing *Seminole Tribe* and *Flores* as “a revolution in Eleventh Amendment jurisprudence,” but lamenting that, unless the lower federal courts embrace these cases, “the Eleventh Amendment revolution will be nothing more than a footnote in history”).

64. Of course, the Supreme Court, in any case it chooses, is the ultimate expositor of constitutional law. The key here, however, is the infrequency with which the Court has permitted itself to interject. But see *Alden*, 119 S. Ct. at 2240; *Florida Prepaid*, 119 S. Ct. at 2199; *College Sav. Bank*, 119 S. Ct. at 2219. For example, in the one-year period ending September 30, 1997, 52,319 appeals were filed in the United States circuit courts (not including the Federal Circuit), while the Supreme Court granted only 135 petitions for writ of certiorari. See 1997 Jud. Bus. U.S. Cts. 76, 85 (Tables B, B-2). The United States Court of Appeals for the Eighth Circuit accounted for 3,335 of those circuit court filings, and the Supreme Court granted certiorari to 15

to elaborate upon the issues raised in *New York*, *Lopez*, *Seminole Tribe*, *City of Boerne*, and *Printz*. Thus, despite the vast scholarly commentary on the subject, the opinion of the circuit courts very well may be the opinion that matters most.⁶⁵

This study will limit itself to a single circuit court, the United States Court of Appeals for the Eighth Circuit, based in St. Louis, to better manage the large and ever-growing body of case law applying the Supreme Court's recent federalism cases. No representations are made regarding the typicality of the Eighth Circuit's disposition of these issues, nor is it suggested that the Eighth Circuit, more or less than any other circuit court, is representative of the federal circuits. Quite simply, the preferred scope of this study requires that it be confined to a single circuit, and the geographic proximity of the Eighth Circuit made it the obvious choice.

The subject matter's geographic boundaries having been reduced to a lone circuit, its temporal limits also should be established. The first of the Supreme Court's federalism cases treated herein, *New York*, is a June 1992 case. *Printz*, the latest case in this line, was handed down on the last day of the Court's October 1996 term. Though the relatively new vintage of these cases lends timeliness, accompanying that obvious advantage is the concomitant risk of myopia. Nonetheless, a study of the effects of these cases at this early stage is

petitions originating in the Eighth Circuit. See 1997 Jud. Bus. U.S. Cts. 76, 86 (Tables B, B-2). In 1998, 53,805 appeals were filed in the circuit courts, and the Supreme Court granted only 109 certiorari petitions. See 1998 Jud. Bus. U.S. Cts. 90, 99 (Tables B, B-2). The Eighth Circuit accounted for 3,330 of those appeals, and the Supreme Court granted certiorari to 22 petitions from the Eighth Circuit. See 1998 Jud. Bus. U.S. Cts. 90, 100 (Tables B, B-2).

65. See generally Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J. L. & PUB. POL'Y 93, 96-100 (1998) (dismissing scholarly predictions and briefly reviewing federal court decisions to determine the impact of *Lopez* and *Printz*).

Although Congress' opinion of these cases obviously cannot be ignored, there is little indication that Congress will choose to stop enacting the kinds of statutes at issue due to the pressure of public opinion to address the pressing problems of the day. See William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J. L. & PUB. POL'Y 140, 140-41, 144 (1998) ("[G]iven the conservative tenor of the present Congress, one might expect to see some manner of change in congressional behavior in light of the Supreme Court decisions. . . . [But] the protection of states through the political processes in Washington is dead, or if not dead, is seriously ill."); Victoria Davis, Note, *A Landmark Lost: The Anemic Impact of United States v. Lopez on the Federalization of Criminal Law*, 75 NEB. L. REV. 117, 148-49 (1996):

Whether *Lopez* will have any impact on Congress is yet to be seen. If it has, federal regulation of local criminal activity should decrease. . . . Yet, the potential future impact of *Lopez* on Congress must be evaluated while keeping in mind the constant pressure from the American public for Congress to be tough on crime.

Naturally, under public pressure for legislation, it is easy to lose sight of the critical distinction between federal and state jurisdiction – a distinction without a difference for much of the general public concerned about issues such as child support, children with guns, carjacking, church burnings, domestic violence, radioactive waste disposal, and clean water.

not without value. The conclusions drawn here from the sampling of a few years certainly will reveal something about the cases' short-term impact, and, given the constraints of *stare decisis*, likely will be some indication of how they will fair in the future.

As for the organization of this Article, the Supreme Court's recent federalism cases are listed chronologically, and each case is explained to the extent necessary for imparting the essential holding and establishing the basic issues as they existed before the Eighth Circuit added its gloss. Each Eighth Circuit decision, in turn, is approached as an application of the pertinent Supreme Court case or cases. Conclusions regarding the impact of the Supreme Court's federalism cases are drawn from the degree to which the Eighth Circuit has been receptive to constitutional challenges based on those cases.

II. *NEW YORK, LOPEZ, SEMINOLE TRIBE, CITY OF BOERNE, PRINTZ, AND THE EIGHTH CIRCUIT RECEPTION*

A. *New York v. United States*

In *New York v. United States*,⁶⁶ the Supreme Court dealt with the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act (LLRW Amendments).⁶⁷ Congress, in an effort to promote the safe and efficient disposal of low-level radioactive waste, enacted the Low-Level Radioactive Waste Policy Act (LLRW Act) in 1980,⁶⁸ and then amended the LLRW Act in 1986 with the LLRW Amendments.⁶⁹ The LLRW Amendments make each state responsible for the disposal of low-level radioactive waste generated within its borders.⁷⁰ To encourage the states to comply with their statutory duty under 2021c(a)(1), the LLRW Amendments include three types of "incentives," the most severe of which is the so-called "take-title" provision.⁷¹ The take-title provision mandates that any state unable

66. 505 U.S. 144 (1992).

67. See Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. §§ 2021b-2021j (1988)).

68. See Pub. L. No. 96-573, 94 Stat. 3347 (1980) (codified at 42 U.S.C. §§ 2021b-2021j (amended 1986)).

69. See Pub. L. No. 99-250, 99 Stat. 1842 (1986).

70. See 42 U.S.C. § 2021c(a)(1) (1988).

71. See 42 U.S.C. § 2021e(d)(2)(C)(1988) (take-title provision). The two less severe incentive provisions are found at 42 U.S.C. § 2021e(a)(2) and (d)(1) (1988). Section 2021e(a)(2), the "access" incentive provision, provides:

Availability of disposal capacity

...

During the seven year period beginning January 1, 1986 and ending December 31, 1992, subject to the provisions of subsections (b) through (g) of this section, each State in which

to provide for the disposal of the waste generated within its borders “shall take title to the waste, shall be obliged to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by [the] generator or owner as a consequence of the failure of the State to take possession of the waste.”⁷²

The State of New York and two of its counties (collectively, New York), seeking to avoid the requirements of the LLRW Amendments, filed suit against the United States requesting a declaratory judgment that the three incentive provisions of the statute are inconsistent with the Tenth Amendment⁷³ and the Guarantee Clause⁷⁴ of the Constitution.⁷⁵

The Supreme Court⁷⁶ first took up the Tenth Amendment claim and began by reviewing the different analyses it previously had used to distinguish federal from state power.⁷⁷ In some cases, the Court had inquired whether the Act of Congress at issue was authorized by one of Congress’ Article I powers,⁷⁸ while in other cases, the Court had asked whether the statute encroached upon the sovereignty of the states retained under the Tenth Amendment.⁷⁹ The Court reconciled these two approaches as “mirror images of each other”⁸⁰ for the

there is located a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section shall make disposal capacity available for low-level radioactive waste generated by any source not referred to in paragraph (1).

Section 2021e(d)(1), the “monetary” incentive provision, provides in pertinent part:

Surcharges

The disposal of any low-level radioactive waste under this section (other than the low-level radioactive waste generated in a sited compact region) may be charged a surcharge by the State in which the applicable regional disposal facility is located, in addition to the fees and surcharges generally applicable for disposal of low-level radioactive waste in the regional disposal facility involved. . . .

72. § 2021e(d)(2)(C).

73. *See* U.S. CONST. amend. X (“The powers not delegated to the United States by the United States Constitution, nor prohibited to the states, are reserved to the states, or to the people.”).

74. *See* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

75. *See New York*, 505 U.S. at 154.

76. Justice O’Connor wrote the opinion of the Court, in which Chief Justice Rehnquist, and Justices Scalia, Kennedy, Souter, and Thomas joined. Justice White wrote an opinion concurring in part and dissenting in part, in which Justices Blackmun and Stevens joined. Justice Stevens also wrote his own opinion concurring in part and dissenting in part.

77. *New York*, 505 U.S. at 155.

78. *See id.* (citing *Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

79. *See New York*, 505 U.S. at 155-56 (citing *Garcia v. San Antonio Met. Trans. Auth.*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869)).

80. *New York*, 505 U.S. at 156.

simple reason “that the Tenth Amendment ‘states but a truism that all is retained that has not been surrendered.’”⁸¹ That is, the Tenth Amendment merely makes explicit what is necessarily implied from the limited and exclusive constitutional grant of powers to Congress: “‘The States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.’”⁸² For this reason, the issue is the same whether it involves the powers affirmatively granted to Congress or the sovereignty reserved to the states.⁸³

Having laid the foundation for deciding the case before it, the Court turned to the specific arguments made by New York in its Tenth Amendment challenge to the LLRW Amendments.⁸⁴ As the Court construed its argument, New York was not challenging Congress’ authority to regulate the interstate market in waste disposal or pre-empt state regulation of radioactive waste.⁸⁵ Nor was it questioning the authority of Congress to subject state governments to generally applicable laws.⁸⁶ Rather, New York’s contention was that Congress, instead of directly regulating private generators and disposers of radioactive waste, chose in the LLRW Amendments to compel the states to regulate that field.⁸⁷ Thus, this was a case about “the circumstances under which Congress may use the States as implements of regulation; that is,

81. *Id.* (quoting *Darby*, 312 U.S. at 124).

82. *Id.* at 156 (quoting *Garcia*, 469 U.S. at 549).

83. *See id.* at 159.

84. *See id.* at 160.

85. *See New York*, 505 U.S. at 160.

86. *See id.* The Court distinguished the case at bar from the line of cases in which several states challenged, as violating the Tenth Amendment, the extension of the generally applicable minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA) to state employers. *See id.* (citing *Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia*, 469 U.S. 528). The Court apparently did so to avoid the “unsteady path” of this volatile line of cases. *Id.* In *Wirtz*, the Court determined that Congress’ application of the FLSA to state hospitals and schools did not exceed its power granted under the Commerce Clause. *See Wirtz*, 392 U.S. at 196-97 (“[V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved.”). Only eight years later, in *Usery*, the Court overruled *Wirtz* and held that Congress’ extension of the FLSA to almost all employees of states and their political subdivisions exceeded the authority granted to Congress. *See Usery*, 426 U.S. at 852, 854-55 (“[T]he States as States stand on a quite different footing from an individual or corporation when challenging the exercise of Congress’ power to regulate commerce.”). In *Garcia*, the Court did another about-face when it overruled *Usery* and held that affording the protections of the FLSA to state employees did not contravene any affirmative limit on Congress’ power under the Commerce Clause. *See Garcia*, 469 U.S. at 555-57 (“The political process ensures that laws that unduly burden the States will not be promulgated.”).

87. *See New York*, 505 U.S. at 160.

whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.”⁸⁸

The Court reaffirmed that, pursuant to the spending power,⁸⁹ Congress generally may withhold federal funds from states failing to meet certain conditions.⁹⁰ Similarly, Congress has authority under the Commerce Clause to present the states a choice between regulating commercial activity according to federal standards or having state law preempted by federal regulation.⁹¹ “By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.”⁹² For these reasons, the “monetary” incentive provision of the LLRW Amendments, authorizing states to surcharge radioactive waste from other states and requiring that states satisfy certain conditions to receive a portion of the proceeds, is a constitutional exercise of Congress’ power under the Spending and Commerce Clauses of Article I and, therefore, does not violate the Tenth Amendment.⁹³ Likewise, the “access” incentive provision, authorizing states to deny access to radioactive waste disposal sites to states failing to meet federal standards, does not exceed Congress’ commerce power or intrude on state sovereignty.⁹⁴

A different case altogether is presented, however, when Congress seeks to “commandeer” state resources by forcing the states to enact and enforce federal standards.⁹⁵ As the Court stated, “[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does

88. *Id.* at 161.

89. *See* U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

90. *See New York*, 505 U.S. at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (“Congress may attach conditions on the receipt of federal funds . . .”).

91. *See id.* at 167-68 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)). In *Hodel*, the Court held that the Surface Mining Act did not exceed the commerce power and did not violate the Tenth Amendment because the statute does not “commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” but merely offers states the choice of either regulating pursuant to federal standards or allowing the federal government to bear the burden of regulation through preemption of state law. *Hodel*, 452 U.S. at 288.

92. *New York*, 505 U.S. at 168.

93. *See id.* at 171-73.

94. *See id.* at 173-74.

95. *Id.* at 161 (citing *Hodel*, 452 U.S. at 288 and quoting *Federal Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 761-62 (1982) [hereinafter *FERC*] (“[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations . . .”).

not authorize Congress to regulate state governments' regulation of interstate commerce."⁹⁶ The Court was concerned that if the case was otherwise and Congress could mandate state regulation, then governmental accountability would be reduced.⁹⁷ State officials, not federal officials, would be made to answer to unhappy constituents, but would be powerless to effect any change in federally mandated policy.⁹⁸

The take-title provision of the LLRW Amendments, as the Court construed it, offers the states a choice between accepting ownership of radioactive waste or regulating the waste pursuant to Congress' instructions.⁹⁹ Because either option standing alone would be beyond the authority of Congress, Congress could not force upon the states a choice between the two impermissible options.¹⁰⁰ "Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'"¹⁰¹

In arriving at this conclusion, the Court rejected the argument that, because Congress may enact laws enforceable in state courts,¹⁰² Congress must have the power to compel state regulation. The Court explained that the enforcement of congressional statutes in state courts is a consequence of the Supremacy Clause¹⁰³ and could not be extrapolated to condone congressional compulsion of state legislatures.¹⁰⁴ The Court also distinguished federal regulations enforceable in state courts against private individuals from the LLRW Amendments' requirement that state legislatures regulate in a particular manner.¹⁰⁵

Similarly, the Court dismissed the government's proposed analogy of a congressional power to commandeer state governments to the well-established power of the federal courts to order state officials to comply with federal law.¹⁰⁶ The Court explained that the federal courts' power to mandate state

96. *Id.* at 162, 166.

97. *See New York*, 505 U.S. at 168.

98. *See id.* at 169.

99. *See id.* at 174-75.

100. *See id.* at 175-76.

101. *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288).

102. *See Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding, under the Supremacy Clause, that a state court may not "deny enforcement to claims growing out of a valid federal law").

103. U.S. CONST. art. VI, cl. 2. The clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

104. *See New York*, 505 U.S. at 178-79.

105. *See id.* at 178.

106. *See id.* at 179.

compliance with federal law, like the congressional power to enact laws enforceable in state courts, is conferred by the Supremacy Clause, as well as by Article III.¹⁰⁷ According to the Court, the Constitution does not grant an analogous power to Congress.¹⁰⁸

Thus, the Court concluded that the take-title provision, as either an accretion of Congress' Article I powers or an infringement of the Tenth Amendment, is inconsistent with the federal structure of government established by the Constitution.¹⁰⁹ Having thus disposed of the take-title provision, the Court declined to reach the constitutionality of that provision under the Guarantee Clause of Article IV.¹¹⁰ Finally, the Court determined that the take-title provision was severable from the other portions of the LLRW Amendments because the remainder of the statute would continue to serve Congress' objective of encouraging the states to properly dispose of radioactive waste.¹¹¹

1. Concerned Citizens of Nebraska v. United States Nuclear Regulatory Commission

The first mention of *New York v. United States* in Eighth Circuit case law appears in *Concerned Citizens of Nebraska v. United States Nuclear Regulatory Commission*.¹¹² In that case, Nebraska and four other states entered a compact for the disposal of low-level radioactive waste pursuant to the LLRW Act of 1980 and, ultimately, the LLRW Amendments of 1985.¹¹³ The compact's governing body designated Boyd County, Nebraska, as the site for a regional disposal facility. Concerned Citizens of Nebraska, a non-profit organization, sought to enjoin the development of the facility.¹¹⁴ It claimed that standards promulgated by the United States Nuclear Regulatory Commission and the Nebraska Department of Environmental Control, which do not require complete containment of radiation at low-level waste disposal

107. *See id.* (quoting U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ; [and] to Controversies between two or more States; [and] between a State and Citizens of another State . . .")).

108. *See id.*

109. *See New York*, 505 U.S. at 177.

110. *See id.* at 183-84. The Court did determine, however, that the access incentive provision and the monetary incentive provision are consistent with the Guarantee Clause. *See id.* at 185. To arrive at this conclusion, the Court assumed, despite serious doubts to the contrary, that such a challenge under the Guarantee Clause is justiciable. *See id.* at 184-86.

111. *See id.* at 186-87.

112. 970 F.2d 421 (8th Cir. 1992).

113. *See id.* at 422.

114. *See id.* at 423.

facilities, are inconsistent with the LLRW Amendments¹¹⁵ and, therefore, violate the separation of powers doctrine and the Supremacy Clause.¹¹⁶

At the outset, the Eighth Circuit¹¹⁷ acknowledged the Supreme Court's decision in *New York*. The Eighth Circuit recognized that the Supreme Court had held the take-title provision of the LLRW Amendments unconstitutional under the Tenth Amendment and had severed that provision from the remainder of the LLRW Amendments. The Eighth Circuit concluded that, because *Concerned Citizens* did not implicate the take-title provision, the issues in that case were unaffected by the Supreme Court's decision in *New York*.¹¹⁸

2. *May v. Arkansas Forestry Commission*

In *May v. Arkansas Forestry Commission*,¹¹⁹ numerous forestry rangers filed a class action suit in federal court against their employer, the Arkansas Forestry Commission.¹²⁰ The suit alleged that the commission's policy of not compensating the rangers for time spent "subject-to-call" violated the overtime provisions of the Fair Labor Standards Act (FLSA).¹²¹ The commission responded by claiming that the Tenth Amendment prohibits the application of the FLSA to state employees.¹²² For this argument, the Commission relied upon *National League of Cities v. Usery*,¹²³ which, unfortunately for the commission, had been explicitly overruled some eight years earlier in *Garcia v. San Antonio Metropolitan Transit Authority*.¹²⁴ The commission, undaunted, argued that the Supreme Court had expressed dissatisfaction with

115. See 42 U.S.C. § 2021b(7) (1988) (requiring "permanent isolation" of low-level radioactive waste).

116. See *Concerned Citizens*, 970 F.2d at 423-26.

117. Judge C. Arlen Beam, writing for a unanimous three-judge panel.

118. See *Concerned Citizens*, 970 F.2d at 422 n.1.

119. 993 F.2d 632 (8th Cir. 1993).

120. See *id.* at 635. A more thorough recitation of the facts of this case is reported at *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912, 914-16 (8th Cir. 1991).

121. *May*, 993 F.2d at 635; see also 29 U.S.C. § 207(a)(1) (1988), which provides in part: [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Id.

122. See *May*, 993 F.2d at 635.

123. 426 U.S. 833 (1976) (holding that the Commerce Clause does not empower Congress to impose the requirements of the FLSA on state and local governments), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

124. 469 U.S. 528, 557 (1985) (overruling *Usery* and holding that applying wage and hour provisions of FLSA to city transit authority employees do not contravene any limit on Congress' commerce power).

Garcia's abrupt overruling of *Usery* in two cases decided in the years following the *Garcia* decision, *New York* and *Gregory v. Ashcroft*.¹²⁵

The Eighth Circuit,¹²⁶ however, harmonized *New York* and *Gregory* with *Garcia*, stating that, in both *New York* and *Gregory*, the Supreme Court expressly declined to reach the Tenth Amendment issue settled in *Garcia*.¹²⁷ *Garcia* had not been reversed in *New York* or *Gregory*, and therefore remained the controlling case.¹²⁸ Accordingly, the Eighth Circuit could not hold that the Tenth Amendment prohibits Congress from applying the FLSA to state forestry rangers.¹²⁹

3. Cheyenne River Sioux Tribe v. South Dakota

The Eighth Circuit next took up *New York* in *Cheyenne River Sioux Tribe v. South Dakota*.¹³⁰ The Cheyenne River Sioux Tribe sought declaratory and preliminary injunctive relief against South Dakota and several of its officials (collectively, the state) pursuant to the Indian Gaming Regulatory Act (IGRA)¹³¹ to compel the state to negotiate in good faith regarding gambling activities conducted by the tribe.¹³² The state, relying on *New York*, claimed that the IGRA violates the Tenth Amendment because it compels states to negotiate gambling compacts with Indian tribes.¹³³

The Eighth Circuit,¹³⁴ however, concluded that the IGRA “‘gives states the right to get involved in negotiating a gaming compact because of the obvious state interest in gaming casino operations within the state boundaries, but does

125. See *May*, 993 F.2d at 635-36; see also *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (holding that neither the Age Discrimination in Employment Act nor the Equal Protection Clause of the Fourteenth Amendment prohibits Missouri from mandating that state judges retire at age seventy).

126. Again, Judge Beam wrote for a unanimous panel.

127. See *id.* at 636 (citing *New York*, 505 U.S. at 160 (“This litigation presents no occasion to apply or revisit the holding[] of [*Garcia*] . . .”), and *Gregory*, 501 U.S. at 464 (noting that *Garcia* constrains the Supreme Court in its “ability to consider the limits that the state-federal balance places on Congress’ powers under the Commerce Clause”)).

128. See *May*, 993 F.2d at 636.

129. See *id.*

130. 3 F.3d 273 (8th Cir. 1993).

131. See 25 U.S.C. § 2710(d)(3)(A) (1988):

Any Indian tribe . . . shall request the State in which [the tribe’s] lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

Id.

132. See *Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523 (D. S.D. 1993), *aff’d*, 3 F.3d 273 (8th Cir. 1993).

133. See *Cheyenne River*, 3 F.3d at 281.

134. Judge Theodore McMillian wrote for a unanimous three-judge panel.

not compel it.”¹³⁵ As construed by the Eighth Circuit, the IGRA gives states the option of: (1) negotiating until a compact is reached; (2) negotiating, but failing to reach a compact, in which case a court would determine whether the state negotiated in good faith; or (3) refusing to negotiate at all, in which case a court could require, under the terms of the IGRA,¹³⁶ that a compact be concluded within sixty days.¹³⁷ If the state persisted in its refusal to negotiate or otherwise participate in the IGRA statutory scheme, then a mediator simply would select a proposed compact submitted by the tribe.¹³⁸ Given these options, the state could not claim that the IGRA forces it to compact with Indian tribes regarding Indian gaming. Therefore, the IGRA does not violate the Tenth Amendment.¹³⁹

4. Fond du Lac Band of Chippewa Indians v. Carlson

The Eighth Circuit next addressed *New York* in *Fond du Lac Band of Chippewa Indians v. Carlson*,¹⁴⁰ wherein Minnesota Chippewa Indians sought, pursuant to 42 U.S.C. § 1983,¹⁴¹ to enjoin state officials from enforcing Minnesota’s fishing and gaming laws contrary to federal treaty rights. The state officials argued that they were immune from suit in federal court under the Eleventh Amendment¹⁴² and that the doctrine of *Ex parte Young*,¹⁴³ which

135. *Cheyenne River*, 3 F.3d at 281 (quoting *Cheyenne River*, 830 F. Supp. at 526).

136. See 25 U.S.C. § 2710(d)(7)(B)(iii) (1988) (“If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact . . . , the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.”).

137. See *Cheyenne River*, 3 F.3d at 281.

138. See *id.*; see also 25 U.S.C. § 2710(d)(7)(B)(iv) (1988):

If a State and an Indian tribe fail to conclude a Tribal-State compact . . . within the 60-day period . . . , the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts

Id.

139. See *Cheyenne River*, 3 F.3d at 281 (citing *New York*, 505 U.S. at 158-59 and *Dole*, 483 U.S. at 210-211 (stating that a federal statute conditioning the receipt of federal benefits on the state’s compliance with federal plans is not a violation of the state’s sovereignty where the state may simply opt not to comply)).

140. 68 F.3d 253 (8th Cir. 1995).

141. See 42 U.S.C. § 1983 (1994 & Supp. III 1997). The statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. . . .

Id.

142. See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

otherwise would allow the Indians to proceed in federal court, should be curtailed as a result of more contemporary cases “that recognize the vitality of state sovereignty.”¹⁴⁴ The state officials, relying on *New York*, argued that, because Congress could not directly compel Minnesota to regulate fishing and gaming in a particular way, the federal courts could not do so either.¹⁴⁵ The Eighth Circuit¹⁴⁶ summarily rejected this argument, noting that the Supreme Court determined in *New York* that “courts under Article III and the Supremacy Clause have the power to order states to perform acts that Congress lacks.”¹⁴⁷

143. 209 U.S. 123 (1908) (holding that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law).

144. *Fond du Lac*, 68 F.3d at 256 n.3.

145. *See id.*

146. Judge Donald P. Lay wrote the opinion for a unanimous three-judge panel.

147. *Fond du Lac*, 68 F.3d at 256 n.3 (citing *New York*, 505 U.S. at 178-80 (“[T]hat federal courts may in proper circumstances order state officials to comply with federal law . . . [does not] imply an authority on the part of Congress to mandate state regulation.”)).

In the years following *Fond du Lac*, the Eighth Circuit decided a string of cases only briefly citing *New York* in support of some simple proposition. First, in *Minnesota Citizens Concerned for Life v. Federal Election Comm’n*, 113 F.3d 129, 131 (8th Cir. 1997), the Eighth Circuit cited generally to *New York*, 505 U.S. at 186, as authority for the district court’s uncontroverted determination that portions of a Federal Election Commission regulation violating the First Amendment could not be severed from the remainder of the regulation.

Second, the Eighth Circuit held, in *United States v. Crawford*, 115 F.3d 1397, 1401 (8th Cir.), *cert. denied*, 118 S. Ct. 341 (1997), that the Child Support Recovery Act, 18 U.S.C. § 228 (1994), was a proper exercise of Congress’ commerce power and, therefore, does not violate the Tenth Amendment. In support, the Eighth Circuit quoted the Supreme Court’s statement in *New York* that, “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.” *Crawford*, 115 F.3d at 1401 (quoting *New York*, 505 U.S. at 156). *Crawford* is more aptly characterized as a *Lopez* challenge and, therefore, is discussed more thoroughly, *infra* Part II.B.14.

Third, in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 917 (8th Cir. 1997), the Eighth Circuit, after finding a portion of an 1850 executive order unconstitutional, again cited *New York*, 505 U.S. at 186, as recent authority for the Supreme Court’s long-established severability test. The *Mille Lacs* case, as it deals with a *Printz* issue raised therein, is more thoroughly considered, *infra* Part II.E.1.

Finally, the Eighth Circuit decided, in *United States v. Wright*, 128 F.3d 1274, 1276 (8th Cir. 1997), that the Violence Against Women Act, 18 U.S.C. § 2262(a)(1) (1994), was validly enacted under Congress’ commerce power and, therefore, does not violate the Tenth Amendment. The Eighth Circuit relied in part on the same language in *New York* that was quoted in *Crawford*, 115 F.3d at 1401 (quoting *New York*, 505 U.S. at 156). *See Wright*, 128 F.3d at 1276. *Wright*, like *Crawford*, is further discussed in its capacity as an application of *Lopez* at Part II.B.15 *infra*.

5. United States *ex rel.* Zissler v. Regents of the University of Minnesota

After *Fond du Lac*, well over two years passed before *New York* again was given substantial attention¹⁴⁸ by the Eighth Circuit in *United States ex rel. Zissler v. Regents of the University of Minnesota*.¹⁴⁹ James Zissler brought suit as a *qui tam* relator,¹⁵⁰ claiming that the University of Minnesota had misallocated federal grant money in violation of the False Claims Act.¹⁵¹ The United States intervened,¹⁵² alleging that the university had, in its dealings with the federal government, presented false claims,¹⁵³ submitted a false record or statement for payment,¹⁵⁴ and concealed or avoided an obligation to the government.¹⁵⁵ The university, relying on *New York*, argued that the penalties for violation of the False Claim Act “impermissibly ‘commandeer the legislative processes of the States’”¹⁵⁶ and, by coercing the states to comply

148. Prior to *Zissler*, the Eighth Circuit decided *Christians v. Chrystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (8th Cir. 1998), in which the panel was split. Although the opinion for the court did not mention *New York*, the dissenting opinion referred to *New York* as a case in which the Supreme Court had reasserted the role of the federal courts in maintaining the separation of powers, *see id.* at 865 (Bogue, J., dissenting), and repeated the Supreme Court’s statement that “‘the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.’” *id.* at 866-67 (Bogue, J., dissenting) (quoting *New York*, 505 U.S. at 187). *In re Young* is more thoroughly discussed, *infra* Part II.D.3 as an application of *City of Boerne*.

149. 154 F.3d 870 (8th Cir. 1998).

150. *Qui tam* refers to “an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution.” BLACK’S LAW DICTIONARY 1251 (6th ed. 1990); *see also* 31 U.S.C. § 3730(b)(1) (1994) (providing that “[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government”).

151. *See Zissler*, 154 F.3d at 871; *see also* 31 U.S.C. §§ 3729-33, 37 (1994) (False Claims Act).

152. *See* 31 U.S.C. § 3730(b)(2), (c)(1) (1994) (providing that the government may intervene and proceed with the action and that, if the government elects to proceed with the action, “it shall have the primary authority for prosecuting the action”).

153. *See* 31 U.S.C. § 3729(a)(1) (1994) (prohibiting “knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval”).

154. *See* 31 U.S.C. § 3729(a)(2) (1994) (prohibiting “knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government”).

155. *See Zissler*, 154 F.3d at 871; *see also* 31 U.S.C. § 3729(a)(7) (1994) (prohibiting “knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government”).

156. *Zissler*, 154 F.3d at 873 (quoting *New York*, 505 U.S. at 161).

with the Act's requirements, unconstitutionally disrupt the federal balance.¹⁵⁷ The Eighth Circuit,¹⁵⁸ citing *New York*,¹⁵⁹ rejected the university's arguments and held that, because the states could avoid the requirements of the Act simply by declining federal grants, the False Claims Act was not unconstitutionally coercive.¹⁶⁰

B. United States v. Lopez

Alfonso Lopez, Jr., arrived at his San Antonio high school on March 10, 1992, with a concealed handgun. When confronted by school authorities, Lopez admitted that he was carrying the handgun. Lopez was arrested by local law enforcement officers and charged with firearm possession on school premises in violation of Texas criminal law.¹⁶¹ The state charges were dismissed when federal prosecutors charged Lopez with violating the Gun-Free School Zones Act (GFSZA).¹⁶² The GFSZA prohibits any individual "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹⁶³ Lopez attacked his indictment on the ground that section 922(q) is beyond the reach of Congress' power under the Commerce Clause.¹⁶⁴

The Supreme Court¹⁶⁵ began its analysis with "first principles."¹⁶⁶ First, the Court stated, the federal government is a government of enumerated

157. See *Zissler*, 154 F.3d at 873. The University is an instrumentality of the State of Minnesota and, for the purposes of this case, was entitled to the same defenses to which the state would be entitled. See *id.* at 871 n.2.

158. Judge Richard S. Arnold wrote for a unanimous three-judge panel.

159. See *Zissler*, 154 F.3d at 873 (citing *New York*, 505 U.S. at 161).

160. See *id.* The Eighth Circuit relied, as it did in *Cheyenne River*, upon *Dole* for the proposition "that the Tenth Amendment allows . . . 'the indirect achievement of objectives which Congress is not empowered to achieve directly,' through conditional federal funding." *Id.* (quoting *Dole*, 483 U.S. at 210).

Following *Zissler*, the Eighth Circuit briefly noted in *Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, No. 98-3858, 1999 WL 615506, at *2 n.3, *4 (8th Cir. Aug. 16, 1999), the State of Nebraska's citation to *New York*, as well as *Printz*, in support of the general principle of state sovereignty. The court determined, however, that neither *New York* nor *Printz* was relevant to the case at bar. See *id.* The Eighth Circuit's disposition of *Central Interstate* is discussed further at Part II.E.2 *infra* in the context of *Printz*.

161. See *United States v. Lopez*, 514 U.S. 549, 551 (1995).

162. See 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993).

163. *Id.*

164. See *Lopez*, 514 U.S. at 551; see also U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

165. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices Kennedy and Thomas concurred separately. Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined. Justices Stevens and Souter also wrote their own dissenting opinions.

powers, while the powers reserved to the states are numerous and undefined.¹⁶⁷ According to the Court, the federal division of power between the states and the national government, like the separation of powers among the branches of government, reduces the risk of accumulation and abuse of power.¹⁶⁸

As the Court stated, one of the enumerated powers, the power relied upon by Congress in enacting the GFSZA, is Congress' authority to regulate interstate commerce.¹⁶⁹ Embarking on an abbreviated review of its Commerce Clause jurisprudence, the Court commented that, since its first construction of the commerce power, it consistently had recognized the inherently limited nature of that power.¹⁷⁰ Although the Court's New-Deal-era cases had "greatly expanded the previously defined authority of Congress under th[e] [Commerce] Clause,"¹⁷¹ those cases and succeeding cases acknowledged the necessary limits of the interstate commerce power in a federal system of government.¹⁷² From its modern precedent, the Court construed three categories of activity that are appropriate subjects for regulation under the interstate commerce power: (1) "the use of the channels of interstate commerce;"¹⁷³ (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from

166. *Lopez*, 514 U.S. at 552.

167. *See id.* (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.")).

168. *See Lopez*, 514 U.S. at 552 (quoting *Gregory*, 501 U.S. at 458 ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.")).

169. *See Lopez*, 514 U.S. at 552.

170. *See id.* at 553 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.")).

171. *Lopez*, 514 U.S. at 556 (citing *Jones & Laughlin Steel*, 301 U.S. at 36-38; *Darby*, 312 U.S. at 118; *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (rejecting the distinction between direct and indirect effects of regulated activity on interstate commerce and holding that application of the Agricultural Adjustment Act to homegrown wheat is within Congress' commerce power)).

172. *See Lopez*, 514 U.S. at 556-57 (citing *Hodel*, 452 U.S. at 276-80; *Perez*, 402 U.S. at 155-56; *Wirtz*, 392 U.S. at 196-97; *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964)).

173. *Lopez*, 514 U.S. at 558 (citing *Darby*, 312 U.S. at 114 and quoting *Heart of Atlanta Motel*, 379 U.S. at 256 ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." (internal quotations and citation omitted))).

intrastate activities;”¹⁷⁴ and (3) “those activities that substantially affect interstate commerce.”¹⁷⁵

Having established this constitutional framework for analysis of congressional legislation under the Commerce Clause, the Court turned to an application of the framework to section 922(q) of the GFSZA. Because section 922(q) clearly does not purport to regulate either the channels of interstate commerce or an instrumentality of interstate commerce, it could be justified only as a regulation of an activity substantially affecting interstate commerce.¹⁷⁶

Contrasting the case at bar with *Wickard v. Filburn*,¹⁷⁷ “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,”¹⁷⁸ the Court determined that “[s]ection 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”¹⁷⁹ Unlike the Agricultural Adjustment Act construed in *Wickard*, section 922(q) is not a regulation of economic activities that, when considered collectively, substantially affect interstate commerce.¹⁸⁰ Nor does the text of section 922(q) include a jurisdictional requirement to make certain that any firearm, the possession of which is prosecuted under section 922(q), has moved in or otherwise affected interstate commerce.¹⁸¹ As the Court conceded, it generally

174. *Lopez*, 514 U.S. at 558 (citing *The Shreveport Rate Cases*, 234 U.S. 342 (1914) (holding that Congress, in exercising its power under the Commerce Clause, may regulate the intrastate operation of the instrumentalities of commerce to foster and protect interstate commerce); *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911) (holding application of Safety Appliance Act to vehicles in interstate commerce is within interstate commerce power); quoting *Perez*, 402 U.S. at 150 (“[F]or example, the destruction of an aircraft, or . . . thefts from interstate shipments.”)).

175. *Lopez*, 514 U.S. at 558-59 (citing *Jones & Laughlin Steel*, 301 U.S. at 37; *Wirtz*, 392 U.S. at 196 n.27).

176. See *Lopez*, 514 U.S. at 559.

177. 317 U.S. 111 (1942).

178. *Lopez*, 514 U.S. at 560 (explaining the *Wickard* Court’s determination that production and consumption of homegrown wheat, in the aggregate, substantially influences interstate and foreign commerce).

179. *Id.* at 561. The Court stated that “[u]nder our federal system, the States possess primary authority for defining and enforcing criminal law” and expressed its concern that “[w]hen Congress criminalizes conduct already denounced as criminal by the States, it affects a change in the sensitive relation between federal and state criminal jurisdiction.” *Id.* at 561 n.3 (internal quotations and citations omitted).

180. See *id.* at 561; see also *id.* at 567 (“The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”).

181. See *id.* at 561; see also *id.* at 567 (“[Lopez] was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.”).

does not require congressional findings regarding the substantial effects of a regulated activity on interstate commerce. Nonetheless, the Court noted, when the regulated activity's bearing on interstate commerce is not readily apparent, such findings could lend support to Congress' conclusion that the activity is susceptible of regulation. In this case, Congress failed to document the effect, if any, of guns in school zones on interstate commerce.¹⁸²

Next, the Court refuted the government's contention that possession of a gun near a school does in fact substantially affect the national economy by necessitating insurance to distribute the costs of gun-related crime, impeding travel to unsafe areas of the country, and diminishing the ability of schools to cultivate economically productive citizens.¹⁸³ According to the Court, the government's arguments would allow Congress to regulate any activity deemed a factor in the economic productivity of individual citizens, even in the areas of criminal law and education traditionally reserved for state regulation.¹⁸⁴ The Court refused the government's invitation "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."¹⁸⁵ To do otherwise, said the Court, would be to conclude "that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local."¹⁸⁶

Finally, the Court conceded that its resolution of the case would engender some legal uncertainty, but depicted such uncertainty as an unavoidable consequence of the constitutional system of enumerated powers, which, in the absence of a plenary police power, necessitates imprecise judicial line-drawing.¹⁸⁷

1. United States v. Mosby

The Eighth Circuit's first occasion to discuss *Lopez* came in *United States v. Mosby*.¹⁸⁸ Ivory Mosby,¹⁸⁹ a felon, was convicted for possessing firearm

182. See *id.* at 562-63. Congressional findings regarding the impact of guns in and around schools on interstate commerce were added to § 922(q) in Pub. L. No. 103-322, 108 Stat. 2131 (1994) (codified at 18 U.S.C. § 922(q)(1)(A)-(I) (1994)).

183. See *Lopez*, 514 U.S. at 563-64.

184. See *id.* at 564.

185. *Id.* at 567.

186. *Id.* at 567-68 (citing *Gibbons*, 9 Wheat. at 195, and *Jones & Laughlin Steel*, 301 U.S. at 30).

187. See *Lopez*, 514 U.S. at 566-67.

188. 60 F.3d 454 (8th Cir. 1995).

189. Mosby presumably has found religion since his conviction and now goes by Rafiz Zareef Muhaymin. See *Mosby*, 60 F.3d at 454.

ammunition in violation of 18 U.S.C. § 922(g)(1).¹⁹⁰ Because the gun cartridges possessed by Mosby were manufactured entirely within the state of Minnesota, and Mosby was found in possession of the cartridges within that state,¹⁹¹ he claimed that the conduct for which he was convicted was not “in or affecting commerce” for the purposes of section 922(g)(1).¹⁹²

The Eighth Circuit¹⁹³ rejected Mosby’s construction of section 922(g)(1) as too constricted. The court determined, based on the text of the statute, that the interstate commerce element of section 922(g)(1) does not limit to commerce *in ammunition* the commerce that Mosby’s possession of ammunition must be “in or affecting.” Rather, according to the court, commerce of any type, including commerce in the component parts of ammunition, is relevant to prove the interstate commerce element.¹⁹⁴ Because the components of Mosby’s cartridges were imported from other states, Mosby possessed ammunition in interstate commerce as prohibited by section 922(g)(1).¹⁹⁵

Finally, the Eighth Circuit determined that, “[a]lthough the recent Supreme Court decision in *United States v. Lopez* limits Congress’s exercise of its commerce power, that power remains broad enough to support application of section 922(g)(1) in this case.”¹⁹⁶ The Eighth Circuit explained *Lopez*’s recognition of three categories of activity susceptible of regulation under the interstate commerce power, and determined that section 922(g)(1) could be categorized as a regulation of either “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” or “those activities having a substantial relation to interstate commerce.”¹⁹⁷ Based on its finding that the ammunition components in question were in interstate commerce, the

190. See 18 U.S.C. § 922(g)(1) (1994), providing:

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

....

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

191. *Mosby* was unusual in this respect. As the Eighth Circuit explained, in a typical § 922(g) case, evidence exists that the ammunition or firearm in question was manufactured in a state other than the state in which the defendant was caught possessing it, logically implying that the firearm must have traveled interstate. See *Mosby*, 60 F.3d at 455.

192. See *id.*

193. Judge Frank J. Magill wrote for the court.

194. See *Mosby*, 60 F.3d at 456-57. The Eighth Circuit relied in part on the statutory definition of “ammunition,” which includes ammunition as well as its component parts. See 18 U.S.C. § 921(a)(17)(A) (1994) (“The term ‘ammunition’ means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.”).

195. See *Mosby*, 60 F.3d at 457.

196. *Id.* at 456.

197. *Id.* at 456 n.3 (quoting *Lopez*, 514 U.S. at 558-59).

court concluded that the instant application of section 922(g)(1) fell into the category of “things in interstate commerce.”¹⁹⁸

2. United States v. Robinson

In *United States v. Robinson*,¹⁹⁹ the Eighth Circuit²⁰⁰ addressed Frank Robinson’s contention that the federal carjacking statute exceeds the power of Congress under the Commerce Clause.²⁰¹ Robinson had been convicted under the statute for ordering Cornelius Mosley and his family out of their van at gunpoint at a St. Louis, Missouri gas station, and then driving away in the van. Mosley had rented the van in Mississippi to attend his father’s funeral in St. Louis.²⁰²

Although the Eighth Circuit described Robinson’s constitutional claim as his “one possibly meritorious argument,”²⁰³ the court was confident that the carjacking statute was not an unconstitutional exercise of Congress’ power under the Commerce Clause.²⁰⁴ Nonetheless, the court felt compelled to discuss the issue further in light of *Lopez*.²⁰⁵ As in *Mosby*, the Eighth Circuit acknowledged the Supreme Court’s recognition of three categories of activity regulable under the interstate commerce power.²⁰⁶ The Eighth Circuit recalled the Supreme Court’s initial determination that the GFSZA was not a regulation of the channels or instrumentalities of interstate commerce, or of an item in interstate commerce, and that the statute, therefore, could be sustained only as a regulation of an activity substantially affecting interstate commerce.²⁰⁷ As the Eighth Circuit saw it, *Lopez* held that the GFSZA did not regulate an activity substantially affecting interstate commerce because the statute, by its terms, had nothing to do with commerce and lacked a “jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”²⁰⁸ The Eighth Circuit also noted the Supreme Court’s finding that Congress had failed to document any commercial effects of guns in school zones.²⁰⁹

198. *Id.* at 456 n.3.

199. 62 F.3d 234 (8th Cir. 1995).

200. Again, Judge Magill wrote for a unanimous three-judge panel.

201. See 18 U.S.C. § 2119 (1995), which establishes penalties for “[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or intimidation, or attempts to do so”

202. See *Robinson*, 62 F.3d at 235.

203. *Id.*

204. See *id.* at 235-36.

205. See *id.* at 236.

206. See *id.* at 236 (quoting *Lopez*, 514 U.S. at 558-59).

207. See *Robinson*, 62 F.3d at 236 (quoting *Lopez*, 514 U.S. at 559).

208. See *id.* at 236 (quoting *Lopez*, 514 U.S. at 561).

209. See *id.* at 236.

Turning to the case *sub judice*, the Eighth Circuit determined that Congress acted within its commerce power in enacting the carjacking statute.²¹⁰ Because the statute limits its prohibition of carjacking to vehicles that have been “transported, shipped, or received in interstate commerce,”²¹¹ it “fits squarely within the second category of activities regulable by Congress under the commerce clause.”²¹² Furthermore, the statute contains a jurisdictional element requiring a case-by-case showing that the vehicle in question has moved in interstate commerce.²¹³ Finally, the Eighth Circuit noted Congress’ findings that vehicles stolen by carjacking often are shipped to other states for retitling, exported to other countries, or disassembled and distributed for resale as replacement parts.²¹⁴ For these reasons, the Eighth Circuit held, “*Lopez* . . . does not render the carjacking statute unconstitutional, and . . . the carjacking statute is a valid exercise of Congress’s commerce clause powers.”²¹⁵

3. United States v. Rankin

The Eighth Circuit again considered a *Lopez* challenge to 18 U.S.C. § 922(g) in *United States v. Rankin*.²¹⁶ Elbert Rankin had been convicted under section 922(g) as a felon in possession of a sawed-off shotgun and ammunition.²¹⁷ Based on the *Lopez* decision, he moved to dismiss the section 922(g) charge against him for lack of subject matter jurisdiction.²¹⁸

The Eighth Circuit²¹⁹ began its analysis by reiterating the Supreme Court’s holding in *Lopez* that 18 U.S.C. § 922(q) is “‘a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.’”²²⁰ Contrasting section 922(q) with section 922(g), the Eighth Circuit determined that the latter statute “clearly is tied to interstate commerce.”²²¹ Furthermore, the court concluded that Rankin had failed to show that the firearm and ammunition in his possession lacked the required jurisdictional nexus with interstate commerce. The court based its conclusion on evidence that the shotgun was manufactured in New York, the ammunition was manufactured in Illinois, and Rankin was

210. *See id.*

211. *See id.* (quoting 18 U.S.C. § 2119 (1995)).

212. *See Robinson*, 62 F.3d at 236-37.

213. *See id.* at 237 (citing *Mosby*, 60 F.3d at 456).

214. *See id.* at 237; *see also* 138 CONG. REC. H11821-22 (daily ed. Oct. 5, 1992); H.R. REP. NO. 102-851(I), at 13-17 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2829, 2830-33.

215. *Robinson*, 62 F.3d at 237.

216. 64 F.3d 338 (8th Cir. 1995) (per curiam).

217. *See id.* at 339.

218. *See id.*

219. The three-judge panel, consisting of Judges Pasco M. Bowman, J. Smith Henley, and Morris Sheppard Arnold, filed a per curiam opinion.

220. *Rankin*, 64 F.3d at 339 (quoting *Lopez*, 514 U.S. at 561).

221. *Id.* at 339.

found in possession of the gun and ammunition in St. Louis, Missouri. Therefore, the court denied Rankin's motion as "without merit."²²²

4. United States v. Jensen

In *United States v. Jensen*,²²³ Donald Leroy Jensen challenged his conviction for money laundering on the ground that Congress lacked the power to enact 18 U.S.C. §§ 1956(a)(3)(B) and (C),²²⁴ the provisions under which Jensen was convicted. Jensen's money laundering conviction arose out of transactions in which he accepted money from a government informant who had represented that the money consisted of drug proceeds.²²⁵

The Eighth Circuit²²⁶ noted Jensen's citation of *Lopez* as support for his constitutional attack on section 1956 and briefly recalled that the Supreme Court, in *Lopez*, had struck down the GFSZA because Congress lacked the power under the Commerce Clause to enact that statute.²²⁷ Nonetheless, the Eighth Circuit concluded that the reasoning of *Lopez* was inapplicable to

222. *Id.* In the months and years following the *Rankin* decision, the Eighth Circuit filed numerous opinions, most of them unpublished per curiam opinions, that reject similar *Lopez* challenges to § 922(g) and rely heavily on *Mosby*, *Rankin*, and other cases in that line. See, e.g., *United States v. Perkins*, No. 95-1744, 1995 WL 564526 (8th Cir. Sept. 25, 1995) (per curiam); *United States v. Shelton*, 66 F.3d 991, 992-93 (8th Cir. 1995) (per curiam); *United States v. Scott*, No. 95-2527, 1995 WL 601293 (8th Cir. Oct. 12, 1995) (per curiam); *United States v. Harris*, No. 95-2718, 1995 WL 644950 (8th Cir. Nov. 3, 1995) (per curiam); *United States v. Bobo*, No. 95-2777, 1995 WL 644947 (8th Cir. Nov. 3, 1995) (per curiam); *United States v. Merrifield*, No. 95-2872, 1995 WL 681473 (8th Cir. Nov. 17, 1995) (per curiam); *United States v. Malone*, No. 95-3191, 1995 WL 695938 (8th Cir. Nov. 27, 1995) (per curiam); *United States v. Bates*, 77 F.3d 1101, 1103-04 (8th Cir. 1996); *United States v. Corbett*, No. 95-3238, 1996 WL 156702 (8th Cir. Apr. 5, 1996) (per curiam); *United States v. Dotson*, No. 95-3653, 1996 WL 193151, at *2 (8th Cir. Apr. 23, 1996) (per curiam); *United States v. Robertson*, No. 95-3228, 1996 WL 304359 (8th Cir. Jun. 7, 1996) (per curiam); *United States v. Barry*, 98 F.3d 373, 378 (8th Cir. 1996); *United States v. Curtin*, No. 96-2968, 1996 WL 697259 (8th Cir. Dec. 6, 1996) (per curiam); *United States v. Johnson*, No. 96-3378EM, 1997 WL 165176 (8th Cir. Apr. 9, 1997) (per curiam); *United States v. Crawford*, 130 F.3d 1321, 1322 n.1 (8th Cir. 1997); *United States v. Pollard*, No. 97-3722, 1998 WL 42579 (8th Cir. Feb. 5, 1998) (per curiam).

223. 69 F.3d 906 (8th Cir. 1995).

224. See 18 U.S.C. § 1956(a)(3)(B), (C) (1994). That section provides penalties for:

(3) [w]hoever, with the intent—

...

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity. . . .

225. See *Jensen*, 69 F.3d at 908-09.

226. Judge John R. Gibson wrote for the panel.

227. See *Jensen*, 69 F.3d at 910 n.5 (citing *Lopez*, 514 U.S. at 567-68).

Jensen's money laundering case because, "[i]n enacting the money laundering statute, Congress exercised its authority not only under the Commerce Clause, but also under its authority to collect taxes, duties, imposts, and excises."²²⁸

5. United States v. Brown

In *United States v. Brown*,²²⁹ the Eighth Circuit took up Corey D. Brown's claim that 18 U.S.C. § 924(c)(1)²³⁰ is unconstitutional because Congress does not have the power under the Commerce Clause to prohibit the intrastate use or possession of weapons.²³¹

After enumerating the three categories of activity that the *Lopez* Court identified as regulable under the Commerce Clause, the Eighth Circuit²³² turned its attention to categorizing section 924(c)(1). Section 924(c)(1) was implicated in the present case when Brown "use[d] or carrie[d]" a firearm while possessing, with the intent to distribute, crack cocaine as prohibited by 21 U.S.C. § 841(a)(1).²³³ The court noted in rapid succession that "intrastate drug activity affects interstate commerce,"²³⁴ that Congress has the power to "regulate both interstate and intrastate drug trafficking under the Commerce Clause,"²³⁵ and that section 841(a)(1) is a "valid exercise of Congress's

228. *Id.*

229. 72 F.3d 96 (8th Cir. 1995).

230. See 18 U.S.C. § 924(c)(1) (1994) (providing an additional prison term for anyone who, "during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm . . .").

231. See *Brown*, 72 F.3d at 96. Brown also challenged his 181-month prison sentence imposed under 21 U.S.C. § 841(b) for drug trafficking in violation of 21 U.S.C. § 841(a)(1). See *id.* Brown claimed that § 841(b), which establishes a 100-to-1 ratio between penalties for crack cocaine and powder cocaine, violated his equal protection and due process rights, is void for vagueness, and should not be applied on account of the rule of lenity. See *id.* at 97 (citing *United States v. Jackson*, 64 F.3d 1213, 1219-20 (8th Cir. 1995), *cert. denied*, 516 U.S. 1137 (1996)). For an extended discussion of the Eighth Circuit's treatment of like challenges to § 841(b), see Cristian M. Stevens, Note, *Criticism of Crack Cocaine Sentences Is Not What It Is Cracked Up To Be: A Case of First Impression Within the Ongoing Crack vs. Cocaine Debate*, 62 MO. L. REV. 869 (1997).

232. The panel, consisting of Judges Roger L. Wollman, Frank J. Magill, and David R. Hansen, filed a per curiam opinion.

233. *Brown*, 72 F.3d at 97 (quoting § 924(c)(1)); see also 21 U.S.C. § 841(a)(1) (1994) (making it unlawful for any person "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .").

234. *Brown*, 72 F.3d at 97 (citing 21 U.S.C. § 801 (1994) (containing congressional findings that "[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce")).

235. *Id.* (citing *United States v. Curtis*, 965 F.2d 610, 616 (8th Cir. 1992) (stating, prior to *Lopez*, that "[u]nder its authority to regulate commerce . . . Congress may regulate both interstate and intrastate traffic and possession of controlled substances")).

Commerce Clause power.”²³⁶ Thus, the Eighth Circuit rejected Brown’s *Lopez* challenge, finding that the predicate offense triggering Brown’s section 924(c)(1) conviction, drug trafficking activity prohibited by section 841(a)(1), is “an activity that substantially affect[ed] interstate commerce” for the purposes of *Lopez*.²³⁷

6. United States v. Farmer

Thomas Lee Farmer was convicted for attempting to rob a Hy-Vee convenience store in Waterloo, Iowa.²³⁸ Farmer’s plan was foiled when police promptly arrived at the scene shortly after Farmer had entered the store.²³⁹ Farmer claimed on appeal that the Hobbs Act,²⁴⁰ the statute under which he was convicted, was not intended by Congress to reach the kind of “garden-variety, single local robbery” attempted by Farmer.²⁴¹

The Eighth Circuit²⁴² agreed that the Hobbs Act prohibits only the kind of robberies that “obstruct, delay, or affect interstate commerce or the movement of any article or commodity in commerce,” but determined that the attempted

236. *Id.* (citing *United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995)). In *United States v. Bell*, as in *Brown*, the Eighth Circuit rejected “Bell’s attempt to extrapolate the reasoning and holding of *Lopez* to § 924(c)(1).” See *United States v. Bell*, 90 F.3d 318, 320 (8th Cir. 1996). The court cited to *Brown* and held that § 924(c)(1) is not unconstitutional because the underlying drug-trafficking violation of § 841(a)(1) substantially affects interstate commerce. See *Bell*, 90 F.3d at 320-21 (listing cases decided “both before and after *Lopez*,” including *Leshuk*, 65 F.3d at 1111-12; *United States v. Weinrich*, 586 F.2d 481, 498 (5th Cir. 1978); *United States v. McMillian*, 535 F.2d 1035, 1037 n.1 (8th Cir. 1976)).

In *Wolfe v. United States*, the Eighth Circuit considered a *Lopez* challenge to § 841(a)(1) in its own right, not as the predicate for a § 924(c)(1) conviction. See Nos. 95-2780, 95-3785, 1996 WL 416754 (8th Cir. Jul. 26, 1996) (per curiam). The court rejected Wolfe’s claim, relying on its decision in *Brown* that § 841(a)(1) is a valid exercise of the commerce power. See *id.* (citing *Brown*, 72 F.3d at 97). Likewise, in *United States v. Patterson*, the Eighth Circuit concluded that a *Lopez* challenge to § 841(a)(1) “lack[ed] merit” based on the court’s holding in *Brown* that “section 841(a)(1) is a valid exercise of the Commerce Clause power under *Lopez*.” 140 F.3d 767, 772 (8th Cir.), *cert. denied*, 119 S. Ct. 245 (1998) (citing *Brown*, 72 F.3d at 97; *Curtis*, 965 F.2d at 616; *Leshuk*, 65 F.3d at 1111-12).

237. See *Brown*, 72 F.3d at 97 (quoting *Lopez*, 514 U.S. at 559).

238. See *United States v. Farmer*, 73 F.3d 836, 839 (8th Cir. 1996), *cert. denied*, 518 U.S. 1028 (1996).

239. *Id.*

240. See 18 U.S.C. § 1951 (1994). Section 1951(a) states:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned . . .

Id.

241. *Farmer*, 73 F.3d at 843.

242. Then-Chief Judge Richard S. Arnold wrote the opinion of the court.

robbery of the Waterloo convenience store affected interstate commerce.²⁴³ The court noted that the Hy-Vee chain consists of hundreds of stores throughout seven states and that those stores sell products originating from all fifty states and some foreign countries.²⁴⁴ The Eighth Circuit had “no doubt of the power of Congress to protect from violence businesses that are part of an interstate chain.”²⁴⁵ The court acknowledged the narrow holding of *Lopez* invalidating the GFSZA, but concluded that *Lopez* “has no application to cases of commercial establishments, such as the Hy-Vee store involved here.”²⁴⁶

7. United States v. Miller

The Eighth Circuit, in *United States v. Miller*,²⁴⁷ again scrutinized 18 U.S.C. § 922 in light of *Lopez*, but this time the court dealt with a challenge to subsection (u) of that statute, which prohibits stealing a firearm from a gun dealer.²⁴⁸ Eric V. Miller, who pleaded guilty and was convicted under section 922(u), claimed that the statute violated the Tenth Amendment.²⁴⁹

243. *Farmer*, 73 F.3d at 843.

244. *Id.*

245. *Id.*

246. *Id.* (quoting *Lopez*, 514 U.S. at 558, for the proposition that Congress is empowered to “protect . . . persons or things in interstate commerce.”). The Eighth Circuit has relied on *Farmer* several times in rejecting similar *Lopez* challenges to the Hobbs Act. In *United States v. Hoskins*, the court dismissed Hoskins’ claim that the Hobbs Act could not prohibit the robbery of local businesses and, therefore, did not apply to the series of restaurant robberies in which Hoskins engaged. See *United States v. Hoskins*, No. 96-1094, 1996 WL 272526 (8th Cir. May 22, 1996) (per curiam). Similarly, in *United States v. Mosley*, Mosley argued that the Hobbs Act was unconstitutional as applied to his robbery of a gas station because Congress lacks the power to criminalize local robberies. See No. 97-1315, 1998 WL 51373, at *2 (8th Cir. Feb. 6, 1998) (per curiam). The court found, and Mosley conceded, that Mosley’s argument was the same argument rejected in *Farmer*. Based on evidence that the Arkansas gas station targeted by Mosley served interstate travelers and sold products originating in Tennessee, Missouri, and Texas, the Eighth Circuit once again rejected the *Lopez* challenge to the Hobbs Act. See *id.* Finally, in *United States v. Vong*, the court cited to *Farmer* for the proposition that “*Lopez* does not apply to cases involving commercial establishments.” 171 F.3d 648, 654 (8th Cir. 1999) (citing *Farmer*, 73 F.3d at 843). The court held that, because the Hobbs Act expressly requires a jurisdictional nexus, Congress did not exceed the power granted to it by the Commerce Clause. See *Vong*, 171 F.3d at 654.

247. 74 F.3d 159 (8th Cir. 1996).

248. See 18 U.S.C. § 922(u) (1994). Section 922(u) states:

It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee’s business inventory that has been shipped or transported in interstate or foreign commerce.

Id.

249. See *Miller*, 74 F.3d at 159.

The Eighth Circuit²⁵⁰ began with a cursory review of its precedent sustaining subsection (g) of section 922,²⁵¹ a provision whose operative language parallels that of section 922(u).²⁵² The court had held in its previous cases that section 922(g), by virtue of its interstate-commerce element, “ensured through case-by-case inquiry that the firearm in question affected interstate commerce.”²⁵³ Analogizing section 922(u) to section 922(g), the Eighth Circuit determined that the element of section 922(u) requiring the shipment or transportation of the firearm in interstate commerce likewise ensures that the firearm affects interstate commerce.²⁵⁴ Thus, the Eighth Circuit concluded that Miller’s *Lopez* challenge must fail.²⁵⁵

8. United States v. Dinwiddie

Regina Rene Dinwiddie, an anti-abortion demonstrator, was found to have violated the Freedom of Access to Clinic Entrances Act (FACE)²⁵⁶ by obstructing and using physical force against the patients and staff members of a Planned Parenthood abortion clinic in Kansas City, Missouri.²⁵⁷ Dinwiddie was enjoined from further violating FACE and from coming within 500 feet of any reproductive health facility except to engage in certain specified

250. Judges Wollman, Magill, and Hansen filed a per curiam opinion.

251. See 18 U.S.C. § 922(g) (1994). For an exhaustive list of Eighth Circuit cases sustaining § 922(g) against *Lopez* challenges, see *supra* note 222.

252. See *supra* note 190 for the language of § 922(g).

253. *Miller*, 74 F.3d at 159-60 (citing *Shelton*, 66 F.3d at 992; *Rankin*, 64 F.3d at 339).

254. *Id.* at 160.

255. See *id.* at 159. In several subsequent cases, as in *Miller*, the Eighth Circuit relied on its substantial body of § 922(g) precedent to dispose of *Lopez* challenges to other provisions of § 922 containing jurisdiction elements. In *United States v. Schulze*, the court held that a *Lopez* challenge to undifferentiated “weapons-related convictions” was foreclosed by *Bates* and *Shelton* “[b]ecause the provisions under which Schulze was charged contain an interstate commerce requirement.” *Schulze*, No. 95-3356ND, 1997 WL 94706 at *1 (8th Cir. Mar. 6, 1997) (per curiam) (citing *Bates*, 77 F.3d at 1103-04; *Shelton*, 66 F.3d at 992). Also, in *United States v. Kocourek*, the Eighth Circuit rejected a *Lopez* challenge to 18 U.S.C. § 922(j) (1994), which proscribes possession of a stolen firearm and contains a jurisdictional element “virtually identical to that of section 922(g),” for the same reason the court rejected a similar challenge to § 922(g) in *Shelton*. *United States v. Kocourek*, No. 96-1963, 1997 WL 307160, at *1 (8th Cir. May 22, 1997) (per curiam).

256. See 18 U.S.C. § 248(a)(1) (1994), which provides penalties for anyone who:

[B]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or class of persons from, obtaining or providing reproductive health services.

Id.

257. See *United States v. Dinwiddie*, 76 F.3d 913, 917 (8th Cir. 1996).

activities.²⁵⁸ On appeal, Dinwiddie claimed that Congress lacked the power to enact FACE under the Commerce Clause.²⁵⁹

Paraphrasing the *Lopez* Court's enumeration of the three types of activities subject to regulation under the Commerce Clause, the Eighth Circuit²⁶⁰ recognized Congress' power "to regulate the channels of interstate commerce, to regulate or protect the instrumentalities of interstate commerce or people or things involved in interstate commerce, and to regulate conduct that has a substantial effect on interstate commerce."²⁶¹ Elaborating upon the second category, the Eighth Circuit quoted the Supreme Court's determination that Congress may "protect . . . person or things in interstate commerce, even though the threat may come only from intrastate activities."²⁶² Due to the interstate nature of the Planned Parenthood clinic's clientele and the fact that some of the clinic's staff do not reside in Missouri, the Eighth Circuit found that the patients and staff of the clinic, as well as the clinic itself, are engaged in interstate commerce when they obtain or provide reproductive health services.²⁶³ Therefore, the Eighth Circuit concluded that FACE, as applied to the Planned Parenthood clinic, and its staff and patients, "is a valid exercise of Congress's power to protect people and businesses involved in interstate commerce."²⁶⁴

The Eighth Circuit then proceeded to a discussion of the third *Lopez* category, acknowledging that Congress' power to regulate activities substantially affecting interstate commerce extends to "purely intrastate activity if, in the aggregate, the activity has a substantial effect on interstate commerce."²⁶⁵ The court concluded that the activity prohibited by FACE substantially affects interstate commerce because, as congressional findings established, such conduct diminishes interstate commerce in reproductive health services.²⁶⁶ The court cited to *Katzenbach* and *Wickard* for the settled proposition that activities having such a diminishing effect on commerce may be regulated by Congress²⁶⁷ and further noted that "in *Lopez*, the Supreme Court did not overturn *Katzenbach v. McClung*, *Wickard v. Filburn*, or any

258. *See id.* at 918.

259. *See id.* at 919.

260. Then-Chief Judge Arnold again wrote for the panel.

261. *Dinwiddie*, 76 F.3d at 919.

262. *Id.* (quoting *Lopez*, 514 U.S. at 558 and citing *Perez*, 402 U.S. at 150).

263. *See Dinwiddie*, 76 F.3d at 919-20.

264. *Id.* at 920.

265. *Id.* (citing *Lopez*, 514 U.S. at 559-60; *Heart of Atlanta Motel*, 379 U.S. at 258; *Wickard*, 317 U.S. at 125).

266. *See id.*

267. *See id.* (citing *Katzenbach*, 379 U.S. at 299-300; *Wickard*, 317 U.S. at 128-29).

other opinion holding that Congress has the power to regulate conduct that reduces interstate commerce in a good or service.”²⁶⁸

Next, the Eighth Circuit distinguished FACE from the GFSZA, the statute struck down in *Lopez*, on the basis that FACE does not require courts to “‘pile inference upon inference’” to determine that the conduct it prohibits substantially affects interstate commerce.²⁶⁹ Rather, as congressional findings revealed, a direct causal relationship exists between the obstruction of abortion clinics by protesters and the decline in services provided by those clinics.²⁷⁰

Finally, the court considered Dinwiddie’s argument that FACE is not a valid regulation of activity substantially affecting interstate commerce because it regulates, not commercial entities themselves, but private conduct affecting commercial entities.²⁷¹ The court dismissed this argument and explained that Congress’ power to regulate commerce is not limited to commercial entities.²⁷² Thus, the court held that, “*Lopez* notwithstanding, FACE is a valid exercise of Congress’s power to regulate activity that substantially affects interstate commerce.”²⁷³ Having concluded that FACE was properly enacted under the Commerce Clause, the court declined to consider section 5 of the Fourteenth Amendment as an alternative source of congressional power to enact FACE.²⁷⁴

9. United States v. Flaherty

In *United States v. Flaherty*,²⁷⁵ the Eighth Circuit considered John Charles Flaherty’s claim that the evidence presented against him at trial to prove the

268. *Dinwiddie*, 76 F.3d at 921. The Eighth Circuit cited to Justice Kennedy’s concurrence in *Lopez*, in which he stated that post-New Deal cases like *Darby*, *Wickard*, *Heart of Atlanta Motel, Katzenbach v. McClung*, and *Perez* “are within the fair ambit of the Court’s practical conception of commercial regulation and are not called in question by our decision today.” *Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring). Justice Kennedy wrote separately to advocate moderation in the Court’s interpretation of the Commerce Clause, cautioning that “[s]tare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.” *Id.* at 574. Justice Kennedy nonetheless joined the opinion of the Court out of concern that “[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.” *Id.* at 577.

269. *Dinwiddie*, 76 F.3d at 921 (quoting *Lopez*, 514 U.S. at 567).

270. *See id.*

271. *See id.* at 920 (citing *United States v. Wilson* as “the only opinion holding that FACE is not within Congress’s commerce power”); *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis.), *rev’d*, 73 F.3d 675 (7th Cir. 1995).

272. *See Dinwiddie*, at 920-21.

273. *Id.* at 921.

274. *Id.* at 921 n.4.

275. 76 F.3d 967 (8th Cir. 1996).

interstate commerce element of 18 U.S.C. § 844(i)²⁷⁶ was insufficient to convict Flaherty of arson under that statute. Flaherty had set fire to his own restaurant, Eddy's Hamburgers and Malt Shop in Long Lake, Minnesota, in order to collect the proceeds of an insurance policy.²⁷⁷ Based on *Lopez*, Flaherty argued that the Government was required to show a substantial relationship between the restaurant and interstate commerce, but had proven, consistent with the jury instruction given, only that the restaurant was heated with gas from outside of Minnesota.²⁷⁸ Unfortunately, Flaherty had waived the interstate commerce issue by failing to raise it at trial.²⁷⁹ All the same, the court²⁸⁰ sustained the jury instruction because it "mirror[ed]" an instruction approved in a pre-*Lopez* case.²⁸¹

Furthermore, the Eighth Circuit expressed that even had Flaherty not waived the issue, *Lopez* would not have applied to this case.²⁸² The court explained that the GFSZA, "by its terms, had 'nothing to do with commerce or any sort of economic enterprise,' nor did it contain a requirement that the possession [of a firearm] be connected in any way to interstate commerce."²⁸³ By contrast, section 844(i) prohibits the burning of business property and requires the government to show that the property is "'used in interstate or foreign commerce.'"²⁸⁴ The Eighth Circuit concluded that, because *Lopez* does not deal with the amount of evidence sufficient to prove a jurisdictional element, it was not controlling.²⁸⁵

276. See 18 U.S.C. § 844(i) (1994) (establishing penalties for anyone who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate . . . commerce.").

277. See *Flaherty*, 76 F.3d at 969-70.

278. See *id.* at 973.

279. See *id.* Again, in *United States v. Baker*, the Eighth Circuit, relying on *Flaherty*, determined that the appellant had waived his *Lopez* argument. See 98 F.3d 330, 337-38 (8th Cir. 1996), *cert. denied*, 520 U.S. 1179 (1997). Baker claimed that 18 U.S.C. § 175 (1994), which prohibits possession of a toxin for use as a weapon, "was not a valid exercise [of the commerce power] in light of . . . *Lopez*." *Id.* at 337. The Eighth Circuit found, however, that Baker had failed to raise the issue in the district court and held that such failure amounts to a waiver of the issue. See *id.* at 337-38 (citing *Flaherty*, 76 F.3d at 973).

280. *United States v. Flaherty*, 76 F.3d 967 (8th Cir. 1996). Judge Diana E. Murphy wrote for a two-judge majority. Judge John R. Gibson dissented on grounds independent of the *Lopez* issue.

281. *Flaherty*, 76 F.3d at 973 (citing *United States v. Ryan*, 41 F.3d 361 (8th Cir. 1994) (en banc) (approving, in a § 844(i) arson case, an instruction stating, "If you find from the evidence . . . [that] natural gas used to heat the building . . . was supplied from outside the state of Iowa, then the required affect [sic] on interstate commerce has been proved.")).

282. See *id.*

283. *Id.* at 974 (quoting *Lopez*, 514 U.S. at 561).

284. *Id.* (quoting § 844(i)).

285. See *id.*

10. United States v. Monteleone

The Eighth Circuit yet again considered a *Lopez* challenge to 18 U.S.C. § 922 in *United States v. Monteleone*.²⁸⁶ Salvatore Monteleone had been convicted for transferring a firearm to a convicted felon in violation of 18 U.S.C. § 922(d).²⁸⁷ Monteleone had contacted the ATF to declare his ownership of the gun, which had been confiscated from the home of his half brother, a convicted felon. He claimed that section 922(d), lacking an interstate commerce element, is beyond Congress' commerce power.²⁸⁸

The Eighth Circuit²⁸⁹ acknowledged that section 922(d) lacks an interstate commerce element, and thus is applicable to completely intrastate transactions, but it "[d]id not feel that the statute is rendered unconstitutional by the Supreme Court's narrow holding in *Lopez*."²⁹⁰ Reviewing the three *Lopez* categories, the Eighth Circuit determined that section 922(d) could be sustained only as a regulation of an activity that substantially affects interstate commerce.²⁹¹ The Eighth Circuit distinguished the GFSZA and section 922(d) on the basis that the GFSZA proscribes mere possession of a firearm, while section 922(d) deals with disposal of firearms, "an inherently commercial activity."²⁹² According to the court, "the disposal of a firearm . . . , even when consummated in a completely intrastate transaction, is a commercial activity 'that might, through repetition elsewhere, substantially affect . . . interstate commerce.'"²⁹³

Turning to congressional findings regarding section 922(d), the court found that the statute was a response to firearms trafficking in interstate and foreign commerce.²⁹⁴ However, it had been ineffective as originally enacted because it applied only to federally licensed firearms dealers and manufacturers.²⁹⁵ To close a loophole whereby dealers and manufacturers set up strawmen to engage in transactions with convicted felons, Congress had

286. 77 F.3d 1086 (8th Cir. 1996).

287. See 18 U.S.C. § 922(d)(1) (1994), which states:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year

288. See *Monteleone*, 77 F.3d at 1091.

289. Judge Floyd R. Gibson wrote the opinion of the court.

290. *Monteleone*, 77 F.3d at 1091.

291. See *id.* at 1091-92.

292. *Id.* at 1092 (citing *United States v. Lopez*, 2 F.3d 1342, 1354 (5th Cir. 1993) ("[A]cquisition of firearms is more closely related to interstate commerce than mere possession."), *aff'd*, 514 U.S. 549 (1995)).

293. *Id.* (quoting *Lopez*, 514 U.S. at 567).

294. See *id.*

295. See *Monteleone*, 77 F.3d at 1092.

amended the statute to expand its coverage beyond dealers and manufacturers by applying it to “any person.”²⁹⁶ Based on this legislative history, the Eighth Circuit determined that section 922(d) is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁹⁷ For these reasons, the Eighth Circuit held that Congress enacted section 922(d) validly pursuant to its power granted by the Commerce Clause.²⁹⁸

11. *United States v. Baker*

In *United States v. Baker*,²⁹⁹ Robert M. Baker challenged his conviction under the Travel Act³⁰⁰ claiming that the conduct for which he was convicted had an insufficient nexus to interstate commerce.³⁰¹ Baker, a St. Louis police officer, had been convicted for extorting money from a motorist during an early-morning traffic stop and for compelling the motorist, who reported the incident the next day, to withdraw \$300 from an automatic teller machine (ATM) to avoid the costs of defending himself in court.³⁰²

The Eighth Circuit³⁰³ determined that federal jurisdiction under the Travel Act was established by evidence that Baker committed extortion by forcing the motorist to withdraw money from an ATM which, for the purposes of the Travel Act, was “a facility in interstate or foreign commerce.”³⁰⁴ Furthermore, the court concluded that the jurisdictional element of the Travel

296. *Id.* (quoting § 922(d)).

297. *Id.* (quoting *Lopez*, 514 U.S. at 561).

298. *See id.* In *Kocourek*, after disposing of a *Lopez* challenge to § 922(j), the Eighth Circuit relied on *Monteleone* to sustain 18 U.S.C. § 922(x)(1)(A) (1994). *See Kocourek*, 1997 WL 307160, at *1; *see also supra* note 248. Section 922(x)(1)(A) prohibits transferring a handgun to a juvenile and, like § 922(d), lacks an interstate commerce element. *See Kocourek*, 1997 WL 307160, at *1. The Eighth Circuit, nonetheless, concluded that § 922(x)(1)(A) “may be sustained as a valid exercise of Congress’s power to regulate activities that have a substantial relation to interstate commerce.” *Id.* (citing *Monteleone*, 77 F.3d at 1092).

299. 82 F.3d 273 (8th Cir. 1996).

300. *See* 18 U.S.C. § 1952(a) (1994), which establishes penalties for any person who uses “any facility in interstate or foreign commerce,” with the intent to “promote, manage, establish, carry on, or facilitate . . . any unlawful activity,” and thereafter engages or attempts to engage in such activity. *See also* 18 U.S.C. § 1952(b) (1994), which defines “unlawful activity” for the purposes of § 1952(a) as, among other things, “extortion, bribery, or arson in violation of the laws of the State in which committed.”

301. *Baker*, 82 F.3d at 275.

302. *See id.* at 274-75.

303. Judge James B. Loken wrote for a two-judge majority. Judge Theodore McMillian dissented and did not reach the *Lopez* issue. Judge McMillian would have found that use of the ATM was not a part of the plan to commit extortion and, therefore, did not have a “sufficient nexus to the offense to fall within the jurisdictional limits of the Travel Act.” *See Baker*, 82 F.3d at 278 (McMillian, J., dissenting).

304. *Baker*, 82 F.3d at 275 (quoting 18 U.S.C. § 1952(a) (1994)).

Act ensures a sufficient nexus between conduct prosecuted under the Act and interstate commerce regulable under the Commerce Clause because “Congress is empowered to regulate and protect the instrumentalities of interstate commerce . . . even though the threat may come only from intrastate activities.”³⁰⁵

12. United States v. Elliot

The Eighth Circuit’s next opportunity to take an extended look³⁰⁶ at the *Lopez* decision was *United States v. Elliot*.³⁰⁷ The court was faced with Forriss D. Elliot’s claim that the mail fraud statute, 18 U.S.C. section 1341,³⁰⁸ may not be applied to purely intrastate mailings because such mailings do not have a substantial effect on interstate commerce, as required by *Lopez*.³⁰⁹ Elliot, a St. Louis attorney acting as a special assistant attorney general for the State of Missouri, was convicted under the mail fraud statute for grossly overbilling the state via the U.S. mail. Elliot claimed that because all of his fraudulent bills were mailed and received in Missouri, the mail fraud statute was inapplicable.³¹⁰

The Eighth Circuit³¹¹ explained that the Supreme Court struck down the GFSZA in *Lopez* because possession of a gun near a school does not have a substantial effect on interstate commerce.³¹² The mail fraud statute, however, was enacted, not under the interstate commerce power, but under the postal power,³¹³ which gives Congress the authority to regulate even purely intrastate

305. *Id.* (quoting *Lopez*, 514 U.S. at 558).

306. Before the *Elliot* case, the court briefly dealt with a *Lopez* challenge to 18 U.S.C. § 842(i) (1994), which prohibits felons from possessing explosives that “have been shipped or transported in interstate or foreign commerce.” See *United States v. Folen*, 84 F.3d 1103, 1104 (8th Cir. 1996). The court, citing to precedent upholding 18 U.S.C. § 922(g) based on its jurisdictional element, held that Congress did not exceed its power under the Commerce Clause by enacting § 842(i) because the statute’s “express jurisdictional element ensures that it regulates only the possession of explosives that have traveled in interstate commerce.” *Id.* (citing *Bates*, 77 F.3d at 1104; *Shelton*, 66 F.3d at 992).

307. 89 F.3d 1360 (8th Cir. 1996).

308. See 18 U.S.C. § 1341 (1994), which establishes penalties for anyone who: having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service

Id.

309. See *Elliot*, 89 F.3d at 1363.

310. See *id.* at 1362-63.

311. Judge Pasco M. Bowman wrote for a unanimous three-judge panel.

312. See *Elliot*, 89 F.3d at 1364.

313. See U.S. CONST. art. I, § 8, cl. 7 (granting Congress the power to “establish Post Offices and post Roads”).

mail.³¹⁴ The Eighth Circuit thus concluded that *Lopez*, a Commerce Clause case, “has no application whatsoever to the mail fraud statute.”³¹⁵

13. *United States v. McMasters*

In *United States v. McMasters*,³¹⁶ the Eighth Circuit returned to the issue of the constitutionality of 18 U.S.C. § 844(i), the federal arson statute, in light of *Lopez*. McMasters and his co-defendants, who conspired to blow up a rival drug dealer’s residence in Clinton, Iowa, argued that section 844(i) exceeds Congress’ power under the Commerce Clause.³¹⁷

At the outset, the Eighth Circuit³¹⁸ recounted the *Lopez* decision at length, recalling the Supreme Court’s determination that the GFSZA did not have an interstate commerce element or any legislative history regarding the impact of the prohibited activity on interstate commerce.³¹⁹ The Eighth Circuit also noted the Supreme Court’s conclusion that the GFSZA “could not ‘be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.’”³²⁰ In contrast, said the Eighth Circuit, section 844(i) contains a jurisdictional element requiring that any property, the destruction of which is prohibited by the statute, be “‘used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.’”³²¹ Also, the legislative history of section 844(i) reveals Congress’ respect for the limits of its commerce power and contains congressional findings that the conduct prohibited by the statute has an adverse impact on interstate commerce. The Eighth Circuit concluded that because section 844(i) is a regulation of the situs of commercial transactions that, in the aggregate, have a substantial effect on interstate commerce, the statute was enacted within the commerce power and is constitutional on its face.³²²

Nonetheless, the Eighth Circuit did not conclude its analysis because, although the court had determined that section 844(i) is facially valid, “the applicability of section 844(i) in various circumstances may be ‘threaten[ed] by] legal uncertainty’” due to the *Lopez* decision.³²³ McMasters’ argument

314. *See Elliot*, 89 F.3d at 1364.

315. *Id.* at 1364.

316. 90 F.3d 1394 (8th Cir. 1996), *cert. denied*, 519 U.S. 1099 (1997).

317. *See id.* at 1396-97.

318. Judge Magill wrote for the court.

319. *See McMasters*, 90 F.3d at 1397-98.

320. *Id.* at 1398 (quoting *Lopez*, 514 U.S. at 561).

321. *Id.* (quoting 18 U.S.C. § 844(i) (1994)).

322. *See id.*

323. *Id.* (quoting *Lopez*, 514 U.S. at 630 (Breyer, J., dissenting)). The passage from Justice Breyer’s dissent quoted by the Eighth Circuit in *McMasters* reads in its entirety: “The third legal problem created by the Court’s holding is that it threatens legal uncertainty in an area of law that,

that the particular application of the statute to his case was unconstitutional since he had planned to bomb a private residence, not a commercial building, was rejected by the Eighth Circuit because the residence targeted by *McMasters* was rental property that received utility services from sources outside of Iowa and because “rental real estate represents an ongoing commercial enterprise, which frequently has interstate connections.”³²⁴ The Eighth Circuit relied on the Supreme Court’s unanimous holding in *Russell v. United States*, a pre-*Lopez* decision, that the application of section 844(i) to the arson of an apartment building is constitutional.³²⁵ *Lopez* did not overrule *Russell*, according to the Eighth Circuit, although “it is possible . . . that *Lopez* limited the reach of section 844(i) by articulating a more stringent standard.”³²⁶ Under *Lopez*, to be within Congress’ interstate commerce power, the rental property at issue must be used for an activity that has a *substantial* effect on interstate commerce.³²⁷ Already having concluded that the rental of real estate is a kind of economic activity that, in the aggregate, might have a substantial effect on interstate commerce, the court held that “the rental status of [the victim’s] residence provided the necessary nexus to interstate commerce for federal jurisdiction over the defendants’ conspiracy to commit arson.”³²⁸

until this case, seemed reasonably well settled.” Justice Breyer essentially argued in his dissent that “[h]aving found that guns in schools significantly undermines the quality of education in our Nation’s classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun related violence in and around schools is a commercial . . . problem.” *Lopez*, 514 U.S. at 620 (Breyer, J., dissenting). Justice Breyer presented three basic arguments, criticizing the Court’s holding. First, he stated that the majority opinion “[ran] contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence.” *Id.* at 625 (Breyer, J., dissenting). Second, the majority sought to make a “critical distinction between ‘commercial’ and noncommercial ‘transaction[s].’ ” *Id.* at 627 (Breyer, J., dissenting) (quoting *Lopez*, 514 U.S. at 561). Finally, as quoted by the Eighth Circuit in *McMasters*, the Court’s opinion “threaten[ed] legal uncertainty in an area of law that, until this case, seemed reasonably well settled.” *Id.* at 630 (Breyer, J., dissenting).

324. *McMasters*, 90 F.3d at 1398.

325. *See id.* (quoting *Russell*, 471 U.S. 858, 862 (1985) (“[Section 844(i)] only applies to property that is ‘used’ in an ‘activity’ that affects commerce. The rental of real estate is unquestionably such an activity.”)).

326. *Id.* at 1399.

327. *See id.*

328. *Id.* In *United States v. Melina*, the Eighth Circuit again addressed a *Lopez* challenge to § 844(i). *See* 101 F.3d 567, 572-73 (8th Cir. 1996). Citing *McMasters* and discussing *Flaherty* at length, the court determined that Melina, a co-defendant of Flaherty, had waived the *Lopez* issue and that, even if he had not waived the issue, the court had “rejected this precise argument in *Flaherty*, holding that *Lopez* was simply inapplicable.” *Id.* (citing *McMasters*, 90 F.3d at 1397-99; *Flaherty*, 76 F.3d at 973). Finally, in *United States v. Rea*, the court reviewed § 844(i) in light of *Lopez* for the last time to date. *See* 169 F.3d 1111 (8th Cir. 1999). Citing *Melina* and *Flaherty*, the Eighth Circuit explained that “*Lopez* is inapposite to convictions secured pursuant to section 844(i) and does not raise the government’s evidentiary burden on the jurisdictional

14. *United States v. Crawford*

After being convicted for failure to pay child support under the Child Support Recovery Act (CSRA),³²⁹ Lynn Truman Crawford challenged the CSRA as an accretion of Congress' regulatory power under the Commerce Clause and a violation of the Tenth Amendment.³³⁰ Crawford, an emergency room physician residing in Texas, had separated from his wife, who retained custody of the couple's two children and moved to Missouri. Because Crawford failed to make monthly child support payments as ordered by a Texas state court, he was indicted and convicted under the CSRA in the U.S. District Court for the Eastern District of Missouri.³³¹ Crawford maintained that the CSRA is not a valid enactment within any of the three *Lopez* categories because child support is unrelated to interstate commerce.³³²

The Eighth Circuit³³³ first established that the constitutional issue presented by Crawford was governed by *Lopez* and reiterated the three *Lopez* categories.³³⁴ The court found that payment of child support for a child residing in another state requires that money cross state boundaries, and therefore, "[s]uch payments . . . are things in, or having a substantial relation to, interstate commerce" and are regulable "within either the second or the third category of regulations recognized in *Lopez*."³³⁵ In support, the Eighth Circuit recalled the Supreme Court's holding in *Wickard* that discrete activities having only a trivial effect on interstate commerce may nonetheless be regulated under the interstate commerce power if their combined effect on interstate commerce is substantial.³³⁶ The Eighth Circuit also determined that the CSRA fits within the first *Lopez* category because child support on behalf of out-of-state children necessitates the movement of money through the channels of interstate commerce.³³⁷ Thus, the Eighth Circuit held that Congress did not exceed its power under the Commerce Clause when it enacted the CSRA and, therefore, denied Crawford's claim that the CSRA violated the Tenth Amendment.³³⁸

element of the offense." *Id.* at 1113 (citing *Melina*, 101 F.3d at 573; *Flaherty*, 76 F.3d at 973-74).

329. See 18 U.S.C. § 228 (a) (1994) (providing punishment for anyone who "willfully fails to pay a support obligation with respect to a child who resides in another State").

330. *United States v. Crawford*, 115 F.3d 1397, 1398 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 341 (1997).

331. See *id.* at 1398-99.

332. See *id.* at 1400.

333. Judge McMillian wrote for the panel.

334. See *Crawford*, 115 F.3d at 1399-1400.

335. *Id.* at 1400.

336. See *id.* (citing *Wickard*, 317 U.S. at 127-28; *Lopez*, 514 U.S. at 559-67).

337. See *id.*

338. See *id.* at 1401; see also *supra* note 147 for a discussion of *Crawford* as it deals with a Tenth Amendment challenge based on *New York*.

15. *United States v. Wright*

In *United States v. Wright*,³³⁹ the Eighth Circuit considered Larry G. Wright's contention that the Violence Against Women Act (VAWA)³⁴⁰ exceeded Congress' commerce power. Wright had been indicted under the VAWA for traveling from Omaha, Nebraska, to Council Bluffs, Iowa, to violate a protection order issued against him by a Nebraska state court.³⁴¹

Initially, the Eighth Circuit³⁴² recited the now familiar *Lopez* categories and determined that section 2262(a)(1) of the VAWA could not fit within the third *Lopez* category because that category "'define[s] the extent of Congress's power over purely intra state commercial activities,' that nonetheless have interstate effects," while section 2262(a)(1) deals with only interstate travel.³⁴³ Section 2262(a)(1) nonetheless was a constitutional exercise of the commerce power because, as the Supreme Court and the Eighth Circuit had held many times, "crossing state lines is interstate commerce regardless of whether any commercial activity is involved."³⁴⁴ If the case were otherwise and crossing state lines, without more, did not constitute interstate commerce, then numerous federal statutes in addition to section 2262(a)(1) likely would exceed the interstate commerce power.³⁴⁵ The Eighth Circuit concluded that, because section 2262(a)(1) prohibits interstate travel for the purpose of violating a protection order, it was validly enacted under "Congress's authority 'to keep

339. 128 F.3d 1274 (8th Cir. 1997).

340. See 18 U.S.C. § 2262(a)(1) (1994). The section punishes:

A person who travels across a State line or enters or leaves Indian country with the intent to engage in conduct that—

(A)(i) violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued; or
(ii) would violate subparagraph (A) if the conduct occurred in the jurisdiction in which the order was issued; and
(B) subsequently engages in such conduct.

Id.

341. See *Wright*, 128 F.3d at 1274.

342. Judge George G. Fagg wrote the opinion of a unanimous three-judge panel.

343. *Wright*, 128 F.3d at 1275 (quoting *United States v. Robertson*, 514 U.S. 669, 671 (1995) (per curiam)).

344. *Id.* (citing *Heart of Atlanta Motel*, 379 U.S. at 255-56; *Edwards v. California*, 314 U.S. 160, 172 n.1 (1941); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572-73 (1997); *Robinson*, 62 F.3d at 235, 237 n.4; *Lupino v. United States*, 268 F.2d 799, 801 (8th Cir. 1959)).

345. See *Wright*, 128 F.3d at 1275. As examples of statutes whose validity would be in doubt, the Eighth Circuit cited the Animal Enterprise Protection Act, 18 U.S.C. § 43 (Supp. 1994) (prohibiting interstate travel for the purpose of causing physical disruption to an animal enterprise); 18 U.S.C. § 1073 (prohibiting interstate flight to avoid prosecution); 18 U.S.C. § 2101 (prohibiting interstate travel with intent to incite a riot); the Mann Act, 18 U.S.C. § 2423(b) (prohibiting interstate travel for the purpose of engaging in a sexual act with a minor).

the channels of interstate commerce free from immoral and injurious uses.”³⁴⁶ Having held that section 2262(a)(1) falls within the commerce power, the Eighth Circuit summarily rejected Wright’s argument that the statute violates the Tenth Amendment.³⁴⁷

16. *United States v. Bausch*

Following *Wright*, the Eighth Circuit’s next authoritative application³⁴⁸ of *Lopez* was *United States v. Bausch*.³⁴⁹ James Donald Bausch had been convicted for possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B)³⁵⁰ after he photographed, with a camera manufactured in Japan, two minors in sexually suggestive nude poses.³⁵¹ Bausch claimed that Congress lacks the power to prohibit the possession of child pornography when the pornography has neither moved in nor is intended for interstate commerce.³⁵² Therefore, Bausch argued, Congress exceeded its commerce power in enacting section 2252(a)(4)(B).³⁵³

The Eighth Circuit,³⁵⁴ after briefly recounting the three *Lopez* categories, determined that section 2252(a)(4)(B) “is a proper exercise of Congress’s commerce power under the third category.”³⁵⁵ By requiring that the child pornography, or the materials used to produce it, be transported in interstate or

346. *Wright*, 128 F.3d at 1276 (quoting *Caminetti*, 242 U.S. at 491).

347. *See id.*; *see also supra* note 147 for a brief discussion of *Wright* as an application of *New York*.

348. *See* 8TH CIR. R. 28A(i) (providing that “[u]npublished opinions are not precedent and parties generally should not cite them”). After *Wright* but before *Bausch*, the Eighth Circuit considered a *Lopez* challenge to unspecified “drug and weapons charges, including engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848.” *Walkner v. United States*, No. 96-2191, 1997 WL 709304 (8th Cir. Nov. 14, 1997) (per curiam); *see also* 21 U.S.C. § 848. The court summarily rejected the *Lopez* argument because “the statutes under which Walkner was prosecuted are valid under the Commerce Clause.” *Walkner*, 129 F.3d at 123.

349. 140 F.3d at 739 (8th Cir. 1998), *cert denied*, 119 S.Ct. 806 (1999).

350. *See* 18 U.S.C. § 2252(a)(4)(B) (1994), which prohibits:

[K]nowingly possess[ing] 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(ii) such visual depiction is of such conduct

Id.

351. *See Bausch*, 140 F.3d at 740.

352. *See id.*

353. *See id.* at 740-41.

354. Judge Fagg again wrote for the panel.

355. *Bausch*, 140 F.3d at 741 (citing *United States v. Robinson*, 137 F.3d 652 (1998)).

foreign commerce, section 2252(a)(4)(B) “ensures, through a case-by-case inquiry, that each defendant’s pornography possession affected interstate commerce.”³⁵⁶ Because Bausch had taken the pictures with a camera that was manufactured in Japan and had moved in interstate or foreign commerce, the application of section 2252(a)(4)(B) to Bausch’s case was proper.³⁵⁷ The Eighth Circuit further held that “§ 2252(a)(4)(B) is not beyond Congress’s commerce power, and thus is not facially unconstitutional.”³⁵⁸

17. *United States v. Hall*

*United States v. Hall*³⁵⁹ is the first case in which the Eighth Circuit has held that a congressional statute, as applied, exceeds the commerce power in light of *Lopez*. Everett Hall was convicted for possessing an unregistered firearm silencer in violation of 26 U.S.C. § 5861(d).³⁶⁰ He challenged his indictment on the basis that section 5861(d) lacks a jurisdictional element requiring that the silencer at issue have some connection to interstate commerce.³⁶¹ Therefore, claimed Hall, the statute could not be applied to his

356. *Id.*

357. *See id.*

358. *Id.* Following *Bausch*, the Eighth Circuit handed down several cases dealing only briefly with *Lopez*. The dissenting opinion in *In re Young* included a short summary of *Lopez* and citations to *Lopez* for the propositions that “the separation of powers . . . plays a vital role in securing freedom for all” and that the courts must “intervene when one or the other [branch] of Government has tipped the scales too far.” 141 F.3d at 865 (Bogue, J., dissenting) (citing and quoting *Lopez*, 514 U.S. at 577, 578 (Kennedy, J., concurring)). *In re Young* essentially is an application of the Supreme Court’s *City of Boerne* decision and is discussed in that capacity at *infra* Part II.D.3. Similarly, in *United States v. Weaselhead*, the Eighth Circuit relied on *Lopez* for its determination that Congress’ power under the Indian Commerce Clause is subject to “judicially enforceable outer limits.” 156 F.3d 818, 824 (8th Cir. 1998) (quoting *Lopez*, 514 U.S. at 566), *reh’g en banc granted, opinion and judgment vacated*, (order of Dec. 4, 1998), *on reh’g en banc*, 165 F.3d 1209 (8th Cir.), *cert. denied*, 120 S. Ct. 82 (1999). *Weaselhead* is further discussed in the context of *Seminole Tribe* and *City of Boerne*. *See infra* notes 498 and 598. Finally, in *United States v. Puckett*, the Eighth Circuit summarily rejected a *Lopez* challenge to 21 U.S.C. § 856(a)(1) (1994), which prohibits opening or maintaining a place for the purpose of distributing a controlled substance. *See* 147 F.3d 765, 769 n.4 (8th Cir. 1998). The court sustained § 856(a)(1) based on congressional findings that intrastate drug trafficking affects interstate commerce. *See id.* (citing 21 U.S.C. § 801(3) (1994) (finding that “[i]ncidents of the [drug] traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce.”)).

359. 171 F.3d 1133 (8th Cir. 1999).

360. *See id.* at 1138; *see also* 26 U.S.C. § 5861(d) (making it unlawful for anyone to “receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record”); *see also* 18 U.S.C. § 921(a)(3)(C) (defining “firearm” for the purposes of § 5861(d) to include “any firearm muffler or firearm silencer”).

361. *See Hall*, 171 F.3d at 1138.

apparently *intrastate* possession of a silencer without exceeding the bounds of the Commerce Clause.³⁶²

The Eighth Circuit³⁶³ began by reiterating the Supreme Court's statement in *Lopez* that Congress has the authority under the Commerce Clause to regulate even wholly intrastate activities that, "through repetition elsewhere, substantially affect [some] sort of interstate commerce."³⁶⁴ To determine whether the intrastate possession of a silencer substantially affects interstate commerce, the Eighth Circuit asked three questions. First, the court inquired whether section 5861(d) contains a "jurisdictional element which would ensure, through case-by-case inquiry, that the [silencer] possession in question affects interstate commerce."³⁶⁵ The Eighth Circuit answered this question in the negative.³⁶⁶ Second, the court asked whether Hall's intrastate possession of a silencer arose out of, or was connected to, a commercial transaction, making it "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate [silencer possession] were regulated."³⁶⁷ The Eighth Circuit, agreeing with Hall's contention that the completely intrastate possession of a silencer has "nothing to do with 'commerce' or any sort of economic enterprise," again answered in the negative.³⁶⁸ The last inquiry by the court was whether Congress, in the course of enacting section 5861(d), created any legislative history regarding the affect of intrastate possession of a silencer on interstate commerce. The court concluded that "Congress made no legislative findings, either explicit or implicit, from which we may reliably conclude that the intrastate possession of silencers imposes 'substantial burdens' on interstate commerce."³⁶⁹ The Eighth Circuit thus held that the section 5861(d) charge against Hall could not be sustained under the Commerce Clause.³⁷⁰

The court's analysis was not finished, however, because the application of section 5861(d) to Hall's possession of an unregistered silencer might be supported by an alternative source of congressional power. Thus, the court

362. *See id.* The government failed to present any evidence of a connection between Hall's silencer and interstate commerce. Instead, the government argued that Congress has the power to regulate even wholly intrastate possession of a silencer. *See id.*

363. Judge Morris Sheppard Arnold wrote the opinion of the court. Judge Owen M. Panner, a district court judge sitting by designation, concurred in part and concurred in the judgment. Judge Panner's disagreement was with the court's resolution of the *Lopez* issue. *See id.* at 1155 (Panner, J., concurring in part and concurring in the judgment); *see also infra* notes 374-76 and accompanying text for a discussion of Judge Panner's concurring opinion.

364. *Hall*, 171 F.3d at 1138 (quoting *Lopez*, 514 U.S. at 567) (alteration by Eighth Circuit).

365. *Id.* (quoting *Lopez*, 514 U.S. at 561) (alteration by Eighth Circuit).

366. *See id.* at 1138-39.

367. *Id.* at 1139 (quoting *Lopez*, 514 U.S. at 561) (alteration added).

368. *Id.* (quoting *Lopez*, 514 U.S. at 561).

369. *Hall*, 171 F.3d at 1139-40 (quoting *Lopez*, 514 U.S. at 562).

370. *See id.* at 1140.

turned its attention to the government's argument that the authority to prosecute Hall under the relevant statute was based on the Taxing Clause.³⁷¹ After an extended discussion of section 5861(d) as a tax regulation and a firearm registration enforcement provision,³⁷² the court concluded that "Congress had the authority under the taxing clause to define as a crime the possession of an unregistered silencer."³⁷³

The concurring judge agreed that Hall's section 5861(d) conviction was not to be overturned, but disagreed with the court's determination that the conviction could not be sustained under the Commerce Clause.³⁷⁴ He stated that "Congress could properly conclude that a uniform standard and regulatory scheme are needed to manage firearms, silencers, and similar dangerous devices, which are readily transportable," and distinguished section 5861(d) from the GFSZA (struck down in *Lopez*) on that basis.³⁷⁵ Thus, the concurring judge would have held that section 5861(d), as applied to Hall's case, was within Congress' power under the Commerce Clause.³⁷⁶

18. United States v. Emery

In *United States v. Emery*,³⁷⁷ Tony Emery was convicted of killing a federal informant in violation of 18 U.S.C. § 1512(a)(1)(C).³⁷⁸ Emery claimed that section 1512(a)(1)(C) is unconstitutional in light of *Lopez* because it regulates activity that falls outside of Congress' commerce power and lacks a jurisdictional element.³⁷⁹ The Eighth Circuit³⁸⁰ dismissed Emery's arguments stating that "the statute in question does not derive its authority from Congress's authority over interstate commerce, but from Congress's power to maintain the integrity of federal proceedings and investigations."³⁸¹ Thus, the constitutionality of section 1512(a)(1)(C) did not turn on its relationship to interstate commerce, and *Lopez* was inapt.³⁸²

371. *See id.*; *see also* U.S. CONST. art. I, § 8, cl. 1; *supra* note 89 for the text of the Taxing Clause.

372. Section 5861(d) essentially is an enforcement mechanism for 26 U.S.C. § 5821 (1994) (imposing a \$200 tax on each firearm made) and 26 U.S.C. § 5841 (1994) (establishing the National Firearms Registration and Transfer Record and requiring registration of firearms).

373. *Hall*, 171 F.3d at 1140-42.

374. *See id.* at 1155 (Panner, J., concurring in part and concurring in the judgment).

375. *Id.* (Panner, J., concurring in part and concurring in the judgment).

376. *See id.*

377. 186 F.3d 921 (8th Cir. 1999).

378. *See id.* at 924; *see also* 18 U.S.C. § 1512(a)(1)(C) (1994) (prohibiting killing a person with the intent to "prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission . . . of a Federal offense").

379. *See id.*

380. Judge Morris Sheppard Arnold wrote for the court.

381. *Emery*, 186 F. 3d at 924-25.

382. *See id.*

19. *United States v. Danks*

Finally, in *United States v. Danks*,³⁸³ Danks was indicted for possessing a firearm within a school zone, which is prohibited by the amended version of the Gun-Free School Zones Act, 18 U.S.C. § 922(q), the very statute struck down by the Supreme Court in *Lopez*.³⁸⁴ Danks argued that the GFSZA, even as amended, exceeded Congress' interstate commerce power.³⁸⁵

The Eighth Circuit³⁸⁶ explained that in *Lopez*, the Supreme Court struck down the original GFSZA in part because the statute "lacked a 'jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce.'"³⁸⁷ In direct response to the Supreme Court's holding in *Lopez*, Congress amended the GFSZA to include a jurisdictional requirement that any firearm unlawfully possessed under the statute "'has moved in or . . . otherwise affects interstate or foreign commerce.'"³⁸⁸ Danks argued, nonetheless, that the mere insertion of a jurisdictional element did not transform the statute into a constitutional exercise of Congress' commerce power under *Lopez*.³⁸⁹ The Eighth Circuit, relying on its considerable precedent upholding 18 U.S.C. § 922(g)³⁹⁰ by virtue of that section's interstate commerce element, concluded that the amended GFSZA "contains language that ensures, on a case-by-case basis, that the firearm in question affects interstate commerce."³⁹¹ The court therefore held that the amended GFSZA satisfies *Lopez* and does not exceed the interstate commerce power.³⁹²

C. *Seminole Tribe v. Florida*

The Supreme Court, in *Seminole Tribe v. Florida*,³⁹³ held that a provision of the Indian Gaming Regulatory Act (IGRA) that authorizes Indian tribes to

383. No. 98-4147, 1999 WL 615445 (8th Cir. Aug. 13, 1999) (per curiam).

384. *See id.* at *1; *see also* 18 U.S.C. § 922(q)(2)(A) (Supp. III 1997) (making it unlawful for "any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone").

385. *See Danks*, 1999 WL 615445, at *1.

386. Judges McMillian, Richard S. Arnold, and Hansen filed a per curiam opinion.

387. *Danks*, 1999 WL 615445, at *1 (quoting *Lopez*, 514 U.S. at 561); *see also* 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993), *amended by* 18 U.S.C. § 922(q)(2)(A) (Supp. III 1997), the terms of which can be found at the text accompanying *supra* note 163.

388. *Id.* (quoting § 922(q)(2)(A) (Supp. III 1997)).

389. *See id.*

390. *See id.* (citing *Shelton*, 66 F.3d 991 (1995)); *see also* 18 U.S.C. § 922(g) (1994) and *supra* note 190 for the text of § 922(g).

391. *Id.* at *2 (citing *Shelton*, 66 F.3d at 992; *Bates*, 77 F.3d at 1104; *Robinson*, 62 F.3d at 236-37).

392. *See Danks*, 1999 WL 615445, at *2.

393. 517 U.S. 44 (1996).

sue states in federal court violates the Eleventh Amendment.³⁹⁴ The IGRA, enacted under the Indian Commerce Clause,³⁹⁵ requires that a state, upon request by an indigenous Indian tribe, “negotiate with the Indian tribe in good faith to enter into . . . a compact” to govern Indian gaming activities.³⁹⁶ To enforce the state’s good-faith duty to negotiate, the IGRA establishes federal jurisdiction over “any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe . . . or to conduct such negotiations in good faith.”³⁹⁷ Claiming jurisdiction under the IGRA, the Seminole Tribe of Florida filed suit in federal court against the State of Florida and its governor.³⁹⁸ The tribe, requesting an injunction, alleged that Florida and its governor had violated the substantive provisions of the IGRA by refusing to negotiate with the tribe.³⁹⁹

According to the Supreme Court,⁴⁰⁰ the tribe’s lawsuit presented two distinct issues for review. First, the Court would decide whether “the Eleventh Amendment prevent[s] Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause.”⁴⁰¹ Second, the Court would decide whether “the doctrine of *Ex parte Young* permit[s] suits against a State’s Governor for prospective injunctive relief to enforce the good-faith bargaining requirement of the Act.”⁴⁰²

The Court began by reviewing its Eleventh Amendment jurisprudence, which, for over a century, has held that “federal jurisdiction over suits against unconsenting States ‘was not contemplated by the Constitution when establishing the judicial power of the United States.’”⁴⁰³ Because Florida clearly had not consented to suit by the Indian tribe, the tribe argued that either the IGRA abrogated Florida’s Eleventh Amendment immunity from suit in

394. See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

395. See U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power “[t]o regulate Commerce . . . with the Indian Tribes”).

396. 25 U.S.C. § 2710(d)(3)(A) (1994).

397. § 2710(d)(7)(A)(i).

398. See *Seminole Tribe*, 517 U.S. at 51-52.

399. See *id.* at 52.

400. Chief Justice Rehnquist wrote the opinion of the Court, in which Justices O’Connor, Scalia, Kennedy, and Thomas joined. Justice Stevens dissented, as did Justice Souter. Justices Ginsburg and Breyer joined in Justice Souter’s dissenting opinion.

401. *Seminole Tribe*, 517 U.S. at 53.

402. *Id.*

403. *Id.* at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), holding that the Eleventh Amendment immunizes an unconsenting state from suit by one of its own citizens in federal court).

federal court or the *Ex parte Young* exception to immunity allowed the suit to proceed against Florida's governor.⁴⁰⁴

The Court, pointing to the numerous IGRA provisions referring to states as defendants in suits brought under the statute,⁴⁰⁵ determined that "Congress has in section 2710(d)(7) provided an 'unmistakably clear' statement of its intent to abrogate" state sovereign immunity.⁴⁰⁶ The Court thus proceeded to the issue of whether Congress was empowered by the Indian Commerce Clause, pursuant to which the IGRA was enacted,⁴⁰⁷ to abrogate state immunity as it had purported to do in the IGRA.⁴⁰⁸ The Court previously had found congressional power to abrogate state immunity under only two constitutional provisions.⁴⁰⁹ In *Fitzpatrick v. Bitzer*,⁴¹⁰ the Court had determined that the Fourteenth Amendment "expand[ed] federal power at the expense of state autonomy," and therefore, "fundamentally altered the balance of state and

404. See *id.* at 55. See also *Ex parte Young*, 209 U.S. 123 (1908) (allowing suits in federal court seeking prospective injunctive relief against state officials in their official capacities for continuing violations of federal law).

405. As examples of IGRA provisions clearly identifying states as defendants in IGRA lawsuits, the Court listed: § 2710(d)(7)(A)(i) (providing that "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations"); § 2710(d)(7)(B)(ii)(II) (providing that, if the plaintiff-tribe meets its burden of proof, then the "burden of proof shall be upon the State"); § 2710(d)(7)(B)(iii) (providing that, if "the court finds that the state has failed to negotiate in good faith . . . , the court shall order the State and the Indian tribe to conclude . . . a compact"); § 2710(d)(7)(B)(iv) (providing that "the State shall . . . submit to a mediator appointed by the court a proposed compact"); § 2710(d)(7)(B)(v) (providing that "[t]he mediator appointed by the court . . . shall submit to the State . . . the compact selected by the mediator"); § 2710(d)(7)(B)(vi) (providing that "[i]f the State consents to a proposed compact . . . , the proposed compact shall be treated as a Tribal-State compact"); § 2710(d)(7)(B)(vii) (providing that "[i]f the State does not consent . . . to a proposed compact . . . , the mediator shall notify the Secretary"). See *Seminole Tribe*, 517 U.S. at 56-57.

406. *Seminole Tribe*, 517 U.S. at 56 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." (internal quotation omitted))).

407. See *id.* at 60 ("[P]etitioner does not challenge the . . . conclusion that the Act was passed pursuant to . . . Congress' power under the Indian Commerce Clause . . .").

408. See *id.* at 57-59 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985) (stating that "[b]ecause of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, 'pursuant to a valid exercise of power,' unequivocally expresses its intent to abrogate the immunity," and citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976) (holding that a state may be sued in federal court for prospective relief under Title VII of the Civil Rights Act of 1964 because that statute was enacted pursuant to § 5 of the Fourteenth Amendment, which limits the Eleventh Amendment principle of state sovereign immunity))).

409. See *id.* at 59.

410. 427 U.S. 445 (1976).

federal power struck by the Constitution.”⁴¹¹ The *Fitzpatrick* Court held that the ratification of section 1 of the Fourteenth Amendment⁴¹² extended federal power into the realm of state sovereignty previously guarded by the Eleventh Amendment.⁴¹³ Therefore, section 5 of the Fourteenth Amendment,⁴¹⁴ empowering Congress to enforce section 1 and the other substantive⁴¹⁵ sections of the amendment, allowed Congress to abrogate the states’ Eleventh Amendment immunity.⁴¹⁶ In *Pennsylvania v. Union Gas Co.*⁴¹⁷ a plurality of the Court, with a fifth vote from Justice White concurring in the result,⁴¹⁸ reasoned that the Commerce Clause allowed Congress to abrogate the states’ Eleventh Amendment immunity in order to fully make use of the interstate commerce power.⁴¹⁹

The Seminole Tribe argued that the *Union Gas* plurality’s conclusions regarding the Interstate Commerce Clause should apply equally to the Indian Commerce Clause, and therefore *Union Gas* meant that the Indian commerce power included the power to abrogate sovereign immunity.⁴²⁰ Rather than come to that result, the Court overruled *Union Gas* on the basis that the plurality opinion had deviated from the Court’s “established federalism jurisprudence and essentially eviscerated . . . *Hans* [v. *Louisiana*].”⁴²¹ The Court explained that the *Union Gas* plurality, by allowing Congress to abrogate the Eleventh Amendment and thereby subject the states to suit pursuant to the interstate commerce power, had ignored the established principle that Article III exhaustively sets forth the subjects of federal court

411. *Seminole Tribe*, 517 U.S. at 59 (citing *Fitzpatrick*, 427 U.S. at 455).

412. See U.S. CONST. amend. XIV, § 1, which states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

413. See *Seminole Tribe*, 517 U.S. at 59.

414. See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

415. “Substantive” in this context refers simply to the fundamental difference between § 5, which is a procedural enforcement provision, and the other sections of the amendment, which are not merely procedural. It has nothing to do with the substantive, versus procedural, nature of the due process right protected in § 1 against deprivation by the states.

416. See *Seminole Tribe*, 517 U.S. at 59.

417. 491 U.S. 1 (1989).

418. See *Seminole Tribe*, 517 U.S. at 59-60 (citing *Union Gas*, 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part)).

419. See *id.* at 59 (citing *Union Gas*, 491 U.S. at 19-20).

420. *Id.* at 60.

421. *Id.* at 64 (citing *Union Gas*, 491 U.S. at 36 (Scalia, J., dissenting)).

jurisdiction.⁴²² Therefore, the Court declined to follow *stare decisis* and overruled the *Union Gas* decision.⁴²³

By overruling *Union Gas*, the Court “reconfirm[ed] that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government.”⁴²⁴ Thus, the Court held that, even when Congress has plenary power to regulate a particular area, such as Indian commerce, it may not seek to enforce its regulations by abrogating the states’ Eleventh Amendment immunity to suit in federal court.⁴²⁵

The Court acknowledged the criticism that its holding would mean that state violations of federal statutory schemes over which the federal courts have exclusive jurisdiction, like the bankruptcy, copyright, and antitrust laws, would go unremedied.⁴²⁶ The Court explained, however, that “several avenues remain open for ensuring state compliance with federal law,”⁴²⁷ such as suits by the federal government against the states in federal court, injunctive relief under the *Ex parte Young* doctrine, and Supreme Court review of federal questions arising from state court proceedings.⁴²⁸ The Court also stated, “[I]t has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States’ sovereign immunity [T]here is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States.”⁴²⁹

Next, the Court turned to the tribe’s claim that, even if Florida was not amenable to suit, the tribe still could sue the governor of Florida under the *Ex parte Young* exception.⁴³⁰ The Court explained that *Ex parte Young* allows for suits seeking prospective injunctive relief for continuing violations of federal law by state officials.⁴³¹ In the present case, however, the governor’s alleged violation of federal law was his failure to compel the State of Florida to

422. See *id.* at 64-65 (citing *Union Gas*, 491 U.S. at 38, 39 (Scalia, J., dissenting)).

423. See *Seminole Tribe*, 517 U.S. at 66.

424. *Id.* at 72.

425. See *id.*

426. See *id.* at 73 n.16.

427. *Id.*

428. See *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892) (holding that the Eleventh Amendment does not exempt states from suit by the United States in federal court and stating that “the permanence of the Union might be endangered” were it otherwise); *Ex parte Young*, 209 U.S. 123 (1908); *Cohens v. Virginia*, 6 Wheat. 264 (1821) (holding that an appeal to the United States Supreme Court from a state court’s determination of a federal question in favor of a state is not a suit “commenced or prosecuted” against a state for the purposes of the Eleventh Amendment)).

429. *Seminole Tribe*, 517 U.S. at 73 n.16.

430. See *id.* at 73.

431. See *id.*

negotiate in good faith, a duty imposed under the IGRA's elaborate regulatory regime.⁴³² Because "Congress ha[d] prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."⁴³³ The Court therefore declined to apply *Ex parte Young* to allow the tribe's suit to proceed, and held that Florida's governor, like the state itself, was immune from suit.⁴³⁴

1. National Cattle Congress, Inc. v. Iowa Racing & Gaming Commission
(*In re National Cattle Congress, Inc.*)

The Eighth Circuit's first material discussion⁴³⁵ of *Seminole Tribe* was in *National Cattle Congress, Inc. v. Iowa Racing & Gaming Commission* (*In re National Cattle Congress*).⁴³⁶ The National Cattle Congress, Inc. (NCC), which operated a pari-mutuel dog track under a license granted by the Iowa Racing and Gaming Commission, had filed for bankruptcy due to severe financial losses.⁴³⁷ When the commission resolved to revoke the NCC's license, the NCC moved the bankruptcy court to stay the commission's resolution as a violation of the automatic stay provisions of the Bankruptcy Code.⁴³⁸ The bankruptcy court granted a stay against the commission, and the federal district court affirmed the bankruptcy court's order.⁴³⁹ The commission appealed to the Eighth Circuit arguing, based on the Supreme Court's intervening decision of *Seminole Tribe*, that the bankruptcy court's order violated Iowa's Eleventh Amendment immunity.⁴⁴⁰

432. *See id.*

433. *Id.* at 74.

434. *See Seminole Tribe*, 517 U.S. at 76.

435. Before *In re National Cattle Congress*, the Eighth Circuit decided two cases in which it made brief mention of *Seminole Tribe*. First, in *Mausolf v. Babbitt*, the court held that prospective intervenors under Federal Rule of Civil Procedure 24(a) must have Article III standing to intervene in federal court. 85 F.3d 1295, 1300 (8th Cir. 1996). The court relied on *Seminole Tribe*, among other cases, for the basic premise that "Congress cannot circumvent Article III's limits on the judicial power." *Id.* at 1300 (quoting *Seminole Tribe*, 517 U.S. at 65 (stating that, before *Union Gas*, it seemed "fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.")). Second, in *Gaming Corp. of America v. Dorsey & Whitney*, the court acknowledged that "[t]he Supreme Court recently held [§ 2710(d)(7)(A) of the IGRA] unconstitutional under the Eleventh Amendment." 88 F.3d 536, 545 n.10 (8th Cir. 1996). In support of its holding that the IGRA completely preempts the area of Indian gaming regulation, the Eighth Circuit cited to the Supreme Court's reaffirmation in *Seminole Tribe* that "Indian commerce is 'under the exclusive control of the Federal Government.'" *Id.* at 548 (quoting *Seminole Tribe*, 517 U.S. at 72).

436. 91 F.3d 1113 (8th Cir. 1996).

437. *See id.*

438. *See id.* at 1114.

439. *See id.*

440. *See id.*

According to the Eighth Circuit,⁴⁴¹ the holding of *Seminole Tribe* was that “the Indian Commerce Clause . . . does not grant Congress the power to abrogate a State’s immunity under the Eleventh Amendment.”⁴⁴² The Eighth Circuit also acknowledged that *Seminole Tribe* expressly overruled the holding of *Union Gas* that Congress has authority under the Interstate Commerce Clause to abrogate the states’ Eleventh Amendment immunity.⁴⁴³ Accordingly, the Eighth Circuit concluded that the commission’s claim of immunity “may be a complex and serious issue” in light of *Seminole Tribe* and, without expressing its view on the merits of the Eleventh Amendment issue, remanded the case for further consideration.⁴⁴⁴

2. Jensen v. Clark

In *Jensen v. Clarke*,⁴⁴⁵ the Eighth Circuit considered whether the Eleventh Amendment, in light of *Seminole Tribe*, bars a federal court from awarding attorneys’ fees to private plaintiffs ancillary to prospective injunctive relief against state officials. A number of inmates had sued the director of the Nebraska State Prison System and the warden of the Nebraska State Penitentiary in federal court under 42 U.S.C. § 1983,⁴⁴⁶ claiming that the state penitentiary’s practice of housing two men per cell violated the Eighth Amendment.⁴⁴⁷ The district court granted an injunction against the prison officials and awarded attorneys’ fees pursuant to 42 U.S.C. § 1988.⁴⁴⁸ The prison officials challenged the award of attorneys’ fees as a violation of Nebraska’s Eleventh Amendment immunity.⁴⁴⁹

In *Seminole Tribe*, said the Eighth Circuit,⁴⁵⁰ the Supreme Court decided that Congress may abrogate the states’ Eleventh Amendment immunity only if Congress’ “‘intention [is] unmistakably clear in the language of the statute,’” and Congress legislates “‘pursuant to a valid exercise of power.’”⁴⁵¹ The

441. Judges Magill, Henley, and Loken filed a per curiam opinion.

442. *In re National Cattle Congress*, 91 F.3d at 1114.

443. *See id.*

444. *Id.* (citing *Seminole Tribe*, 517 U.S. at 72 n.16). No subsequent direct history of the case exists, and therefore any disposition of the issue by the bankruptcy court on remand is unavailable.

445. 94 F.3d 1191 (8th Cir. 1996).

446. *See* 42 U.S.C. § 1983 (1994). For the text of § 1983, see *supra* note 141.

447. *See Jensen*, 94 F.3d at 1193-94; *see also* U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

448. *See id.* at 1201; *see also* 42 U.S.C. § 1988(b) (1994) (“In any action or proceeding to enforce a provision of section[s] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs . . .”).

449. *See id.* at 1201.

450. Then-Chief Judge Arnold wrote for the court.

451. *Jensen*, 94 F.3d at 1201 (quoting *Seminole Tribe*, 517 U.S. at 56).

prison officials' argument was that section 1988 does not contain "unmistakably clear" language abrogating the states' sovereign immunity, and therefore could not authorize the granting of attorneys' fees against a state in federal court.⁴⁵² But according to the Eighth Circuit, the prison officials were mistaken in their belief that the assessment of attorneys' fees against a state requires abrogation of the Eleventh Amendment. To the contrary, because attorneys' fees are assessed as litigation costs and such costs "have traditionally been awarded without regard for the States' Eleventh Amendment immunity,"⁴⁵³ the awarding of attorneys' fees under section 1988 ancillary to prospective injunctive relief "is not subject to the strictures of the Eleventh Amendment."⁴⁵⁴ The Eighth Circuit therefore held that "section 1988 attorneys' fees do not depend on abrogation of sovereign immunity, and *Seminole Tribe* does not affect the fee award in this case."⁴⁵⁵

3. *In re SDDS, Inc.*

*In re SDDS, Inc.*⁴⁵⁶ was "the latest in a seemingly never-ending series of cases arising from SDDS's . . . struggle to develop a large-scale [solid waste disposal] facility."⁴⁵⁷ This time around, SDDS had moved to enjoin the State of South Dakota and various state officials, in their official capacities, from relitigating in South Dakota state court issues decided by the Eighth Circuit in a previous declaratory judgment action.⁴⁵⁸ The state officials' defense was that such an injunction would violate South Dakota's immunity under the Eleventh Amendment.⁴⁵⁹

The Eighth Circuit⁴⁶⁰ approached the claim of sovereign immunity by briefly retracing Eleventh Amendment jurisprudence. The court noted that, although the plain language of the Eleventh Amendment appears to immunize

452. *See id.* at 1201.

453. *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 695 (1978) (holding that the Eleventh Amendment does not bar an award of attorneys' fees against a state ancillary to prospective injunctive relief)).

454. *Id.* at 1202 (quoting *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989) (holding that the Eleventh Amendment has no application to the calculation of the amount of an award of attorneys' fees against a state ancillary to prospective injunctive relief)).

455. *Id.* In *Weaver v. Clark*, the Eighth Circuit, relying on *Jensen*, again rejected the argument that the Eleventh Amendment, in light of *Seminole Tribe*, immunizes state officials from fee awards under § 1988. *See* 120 F.3d 852, 853 (8th Cir. 1997) (citing *Jensen*, 94 F.3d at 1202-03).

456. 97 F.3d 1030 (8th Cir. 1996).

457. *See id.* at 1032 (quoting *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 265 (8th Cir. 1995) (*SDDS VI*)).

458. *See In re SDDS*, 97 F.3d at 1032.

459. *See id.* at 1032, 1034.

460. Judge Magill wrote for the court.

states only from suits brought by foreigners or citizens of other states,⁴⁶¹ the Supreme Court in *Seminole Tribe* had yet again reaffirmed that:

“the Eleventh Amendment . . . stand[s] not so much for what it says, but for the presupposition which it confirms. That presupposition, first observed over a century ago in *Hans v. Louisiana*, has two parts: first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.”⁴⁶²

The Eighth Circuit further determined that the principle of state sovereign immunity embodied in the Eleventh Amendment does not distinguish between suits for money damages and suits for declaratory or injunctive relief. The court reasoned that “[t]he Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State’s treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”⁴⁶³

Nevertheless, the Eighth Circuit explained that the Supreme Court discerned in *Ex parte Young* an exception to blanket Eleventh Amendment immunity allowing for suits “brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law.”⁴⁶⁴ Applying the *Ex parte Young* exception, the Eighth Circuit determined that the state officials would not have been entitled to immunity from the declaratory suit previously decided by the court, and therefore could not claim to be immune from the present suit seeking an injunction to enforce that earlier decision.⁴⁶⁵

4. Crawford v. Davis

In *Crawford v. Davis*,⁴⁶⁶ Michelle Crawford, a student at the University of Central Arkansas (UCA), filed suit in federal court against the UCA and several university officials, in their official capacities, claiming she had been sexually harassed by one of her instructors in violation of Title IX of the Education Amendments of 1972.⁴⁶⁷ The UCA and university officials, relying

461. See U.S. CONST. amend. XI. For the language of the Eleventh Amendment, see *supra* note 394.

462. *In re SDDS*, 97 F.3d at 1035 (quoting *Seminole Tribe*, 517 U.S. at 54).

463. *Id.* (quoting *Seminole Tribe*, 517 U.S. at 58).

464. *Id.* (quoting *Fond du Lac*, 68 F.3d at 255).

465. See *id.* at 1035-36.

466. 109 F.3d 1281 (8th Cir. 1997).

467. See *id.* at 1282; see also 20 U.S.C. § 1681(a) (1994) (providing that “[n]o person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance”).

on *Seminole Tribe*, claimed that they were immune from suit in federal court under Title IX because that statute was enacted pursuant to the Spending Clause, which does not grant Congress the power to abrogate the states' Eleventh Amendment immunity.⁴⁶⁸

The Eighth Circuit⁴⁶⁹ began by explaining that, in *Seminole Tribe*, the Supreme Court concluded that Congress properly abrogates the states' Eleventh Amendment immunity only "if it unequivocally expresses its intent to do so and if it legislates 'pursuant to a constitutional provision granting Congress the power to abrogate.'"⁴⁷⁰ Regarding the first condition, the Eighth Circuit determined that Congress had unequivocally expressed its intent to abrogate the states' immunity to suit under Title IX.⁴⁷¹ The court construed the second condition as requiring only that Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to abrogate, not that Congress had the specific intent to legislate pursuant to that authority.⁴⁷²

As established in *Seminole Tribe*, section 5 of the Fourteenth Amendment is the only constitutional provision under which Congress properly may abrogate the states' Eleventh Amendment immunity.⁴⁷³ According to the Eighth Circuit, Title IX, the purpose of which is to remedy gender discrimination in education, is "appropriate legislation" under section 5 of the Fourteenth Amendment for enforcement of the substantive sections of the amendment because the Supreme Court previously had held that section 1 of the Fourteenth Amendment prohibits exactly the kind of discrimination prohibited by Title IX.⁴⁷⁴ Therefore, Congress could have abrogated the states' sovereign immunity pursuant to section 5 of the Fourteenth Amendment, and, having unequivocally expressed its intention to abrogate, did so in Title IX.⁴⁷⁵

468. See *Crawford*, 109 F.3d. at 1282-83.

469. Judge Morris Sheppard Arnold wrote for a unanimous three-judge panel.

470. *Crawford*, 109 F.3d at 1282-83 (quoting *Seminole Tribe*, 517 U.S. at 59).

471. See *id.* at 1283 (citing 42 U.S.C. § 2000d-7(a)(1) (1994) (stating that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.]")).

472. See *id.*

473. See *id.*

474. See *id.* (citing *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding that Virginia failed to show an "exceedingly persuasive justification" for excluding women from the Virginia Military Institute and, therefore, violated the Equal Protection Clause of the Fourteenth Amendment)); see also *supra* notes 412 and 414 for the pertinent text of the Fourteenth Amendment.

475. Subsequent to *Crawford*, the Eighth Circuit again faced the issue of Congress' power to abrogate the states' Eleventh Amendment immunity to Title IX claims in *Prinsloo v. Arkansas State University*. 112 F.3d 514, No. 96-3120, 1997 WL 234686 (8th Cir. May 9, 1997) (per curiam) (unpublished table decision). The court stated that, "[i]n *Crawford*, the Court decided the

5. Moad v. Arkansas State Police Department

In *Moad v. Arkansas State Police Department*,⁴⁷⁶ Arkansas state troopers sued their employer, the Arkansas State Police Department, for unpaid overtime under the FLSA.⁴⁷⁷ Relying on *Seminole Tribe*, the state argued that it was immune from suit in federal court under the FLSA because the Interstate Commerce Clause, pursuant to which the FLSA apparently was enacted, does not grant Congress the authority to abrogate the states' Eleventh Amendment immunity.⁴⁷⁸

The Eighth Circuit⁴⁷⁹ began by repeating the Supreme Court's determination in *Seminole Tribe* that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I . . . cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."⁴⁸⁰ The Eighth Circuit explained that, in *Seminole Tribe*, the Supreme Court had held that the Indian Commerce Clause does not empower Congress to abrogate the states' Eleventh Amendment immunity and, by overruling *Union Gas*, explicitly had rejected the argument that Congress could abrogate Eleventh Amendment immunity pursuant to the Interstate Commerce Clause.⁴⁸¹

The state troopers nonetheless argued that the FLSA could have been passed pursuant to the Fourteenth Amendment, which enables Congress to subject the states to suit in federal court.⁴⁸² The Eighth Circuit dismissed the argument, however, because the troopers had failed to raise the issue in the district court and in their opening appellate brief.⁴⁸³ For the same reason, the court also rejected the troopers' argument that Arkansas waived its Eleventh Amendment immunity by allowing itself to be sued under the FLSA prior to the *Seminole Tribe* decision. Thus, the Eighth Circuit held that, "in enacting

same issue we are asked to decide in this case . . . [and] squarely held that under *Seminole Tribe* . . . the Eleventh Amendment does not deprive the federal courts of jurisdiction to hear Title IX claims." *Id.* (citing *Crawford*, 109 F.3d at 1282-83). Furthermore, the Eighth Circuit noted that the *Crawford* court had explicitly rejected the argument that Congress enacted Title IX under the Spending Clause, not § 5 of the Fourteenth Amendment, and therefore lacked the power to abrogate the states' immunity to Title IX actions. *Id.* (citing *Crawford*, 109 F.3d at 1283). Likewise, in *Lam v. Curators of the University of Missouri*, the Eighth Circuit was "bound" by the holding of *Crawford* and, therefore, rejected the argument that "*Seminole Tribe* had divested the federal courts of subject matter jurisdiction over Title IX suits." 122 F.3d 654, 656 (8th Cir. 1997) (citing *Crawford*, 109 F.3d at 1282-83).

476. 111 F.3d 585 (8th Cir. 1997).

477. *See id.* at 586. *See* 29 U.S.C. § 207(a) (1994) and *supra* note 121 for the pertinent text of the FLSA.

478. *See Moad*, 111 F.3d at 586-87.

479. Judge Morris Sheppard Arnold wrote for a unanimous three-judge panel.

480. *Moad*, 111 F.3d at 586 (quoting *Seminole Tribe*, 517 U.S. at 72-73).

481. *See id.*

482. *See id.* at 587.

483. *See id.*

the FLSA, Congress had no power to abrogate a state's Eleventh Amendment immunity under the Interstate Commerce Clause."⁴⁸⁴

6. *Santee Sioux Tribe v. Nebraska*

In *Santee Sioux Tribe v. Nebraska*,⁴⁸⁵ the Santee Sioux Tribe of Nebraska sought declaratory relief against the State of Nebraska and its governor for failing to negotiate with the tribe in good faith as required by the IGRA.⁴⁸⁶ The state claimed Eleventh Amendment immunity under *Seminole Tribe*.⁴⁸⁷ The tribe argued that the state had waived its sovereign immunity by enacting Nebraska Revised Statutes section 9-1,106, which references the IGRA,⁴⁸⁸ and that Nebraska's governor was subject to suit under *Ex parte Young*.⁴⁸⁹

The Eighth Circuit⁴⁹⁰ first recounted the holding of *Seminole Tribe* that "Congress lacked authority under the Indian Commerce Clause to abrogate the

484. *Id.* In several cases following *Moad*, the Eighth Circuit again approached the issue of Congress' authority to subject the states to suit under the FLSA. In *Raper v. Iowa*, the Eighth Circuit again noted that, "[i]n *Seminole Tribe*, the Supreme Court concluded that Congress lacks the power to abrogate a state's Eleventh Amendment immunity when it enacts legislation under the Interstate Commerce Clause." 115 F.3d 623, 623-24 (8th Cir. 1997) (citing *Moad*, 111 F.3d at 586-87). Furthermore, the *Raper* court, disposing of the issue that the *Moad* court had declined to decide, held that Congress could not have abrogated the states' Eleventh Amendment immunity under § 5 of the Fourteenth Amendment because the "FLSA's overtime provisions cannot be regarded as serving a Fourteenth Amendment purpose." *Id.* at 624. The court explicitly left for another day the issue of whether the Fourteenth Amendment gives Congress the authority to abrogate Eleventh Amendment immunity to enforce the equal-pay provisions of the FLSA. *Id.* In *Rehberg v. Iowa Department of Public Safety*, the Eighth Circuit held that *Raper* foreclosed the argument that Congress could have abrogated the states' Eleventh Amendment immunity pursuant to § 5 of the Fourteenth Amendment to allow state employees to sue in federal court for overtime compensation under the FLSA. See 117 F.3d 1423, No. 96-4258, 1997 WL 397025 (8th Cir. Jul. 16, 1997) (per curiam) (unpublished table decision) (citing *Raper*, 115 F.3d at 624).

485. 121 F.3d 427 (8th Cir. 1997).

486. See generally 25 U.S.C. § 2710(d) (1994); see also *supra* notes 130 and 405 and accompanying text for the pertinent text of § 2710(d) of the IGRA.

487. *Id.* at 430.

488. See NEB. REV. STAT. § 9-1, 106 (Supp. 1996), which states in pertinent part:

(1) Upon request of an Indian tribe having jurisdiction over Indian lands in Nebraska, the Governor or his or her designated representative . . . shall, pursuant to 25 U.S.C. 2710 of the federal Indian Gaming Regulatory Act, negotiate with such Indian tribe in good faith for the purpose of entering into a tribal-state compact governing . . . gaming as defined in the act. . . .

(3) Such compact negotiations shall be conducted pursuant to the provisions of 25 U.S.C. 2710 of the federal Indian Gaming Regulatory Act.

Id.

489. *Santee Sioux Tribe*, 121 F.3d at 429-30.

490. Judge Hansen wrote for a two-judge majority. Judge McMillian dissented because he believed that Nebraska had waived its sovereign immunity. See *Santee Sioux Tribe*, 121 F.3d at 432 (McMillian, J., dissenting); see also *infra* text accompanying notes 504-07.

states' sovereign immunity, and that section 2710(d)(7) cannot grant federal jurisdiction over states that do not consent to suit."⁴⁹¹ Furthermore, the Eighth Circuit explained that the Supreme Court decided that the *Ex parte Young* exception did not apply to subject Florida's governor to suit under the IGRA.⁴⁹²

The Eighth Circuit then noted that, although the Eleventh Amendment "has been interpreted 'to extend to suits by all persons against a state in federal court,'"⁴⁹³ the state may waive its immunity by consenting to suit in federal court.⁴⁹⁴ To determine whether Nebraska had waived its claimed immunity, the Eighth Circuit asked whether the state had expressed its intention to do so "by the most express language or by such overwhelming implication from the text [of the relevant state statute] as will leave no room for any other reasonable construction."⁴⁹⁵ In answering this question, the Eighth Circuit concluded that neither the language nor the legislative history of section 9-1,106 indicates that Nebraska intended to waive its sovereign immunity.⁴⁹⁶ Furthermore, the Eighth Circuit determined that the Nebraska assistant attorney general assigned to the case could not have waived the state's Eleventh Amendment immunity by answering the tribe's complaint and filing a counterclaim because he was not authorized by state law to waive Nebraska's immunity.⁴⁹⁷ For these reasons, the tribe's declaratory suit against the state was barred by the Eleventh Amendment.⁴⁹⁸

The Eighth Circuit also determined that Nebraska's governor was not subject to suit under the *Ex parte Young* exception to state sovereign immunity.⁴⁹⁹ The court relied heavily on the Supreme Court's reasoning in *Seminole Tribe* that Congress "had prescribed a detailed remedial scheme for enforcing section 2710(d)(3), with significantly fewer remedies than those available under *Ex parte Young*, thus signaling Congress's intent to limit relief to that available under the statute."⁵⁰⁰ Finally, the Eighth Circuit rejected the tribe's claim that Nebraska's enactment of section 9-1,106 somehow subjected the state's governor to suit under *Ex parte Young*.⁵⁰¹ The court reasoned that

491. *Santee Sioux Tribe*, 121 F.3d at 430.

492. *See id.*

493. *Id.* (quoting *Moad*, 111 F.3d at 586).

494. *See id.*

495. *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)) (alteration added).

496. *See Santee Sioux Tribe*, 121 F.3d at 431.

497. *See id.* at 431-32 (citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945) (stating that, for the attorney general of Indiana to have waived the state's Eleventh Amendment immunity, he must have been empowered to do so under state law)).

498. *See id.* at 432.

499. *See id.*

500. *Id.* (citing *Seminole Tribe*, 517 U.S. at 75-76).

501. *See Santee Sioux Tribe*, 121 F.3d at 432.

the governor's alleged failure to comply with section 9-1,106 was a violation of state law, while *Ex parte Young* allows suit to prevent violations of federal law only.⁵⁰² Thus, the Eleventh Amendment likewise barred the tribe's suit against Nebraska's governor.⁵⁰³

The decision of the Eighth Circuit panel was not unanimous. The dissent, though expressing agreement with the majority's disposition of the suit against Nebraska's governor,⁵⁰⁴ would have held that the state waived its Eleventh Amendment immunity and consented to suit.⁵⁰⁵ The dissent reasoned that, by enacting the provisions of section 9-1,106 and thereby incorporating the duty to negotiate in good faith under the IGRA, Nebraska subjected itself to the remedial provisions of the IGRA creating federal jurisdiction over suits to enforce that duty.⁵⁰⁶ Furthermore, the dissent reasoned that Nebraska waived its sovereign immunity by answering the tribe's complaint and filing a counterclaim for its own benefit.⁵⁰⁷

7. United States ex rel. Rodgers v. Arkansas

The Eighth Circuit's next, and last, in-depth treatment⁵⁰⁸ of *Seminole Tribe* to date is *United States ex rel. Rodgers v. Arkansas*.⁵⁰⁹ In that case, Frankie

502. *See id.*

503. *Id.*

504. Judge McMillian's opinion, though designated a dissent, appears to concur in part and dissent in part.

505. *See Santee Sioux Tribe*, 121 F.3d at 433 (McMillian, J., dissenting).

506. *See id.*

507. *See id.* at 433-34. In *United States v. Santee Sioux Tribe*, a case factually and procedurally related to *Santee Sioux Tribe v. Nebraska*, the Eighth Circuit determined that the tribe's operation of gambling activities without a compact with the State of Nebraska was subject to injunction and an order of temporary closure under the IGRA. *See* 135 F.3d 558, 563-565 (8th Cir. 1998). In the course of its recitation of the procedural history of the case, the Eighth Circuit explained the earlier dismissal of the tribe's suit against Nebraska by reference to the *Seminole Tribe* holding that "Congress lacked the authority to enact the remedial sections of the IGRA allowing an Indian tribe to sue a state, and that these sections comprised an unconstitutional abrogation of the states' sovereign immunity." *Id.* at 560.

508. Directly before and just a short time after *Rodgers*, the Eighth Circuit decided several important Eleventh Amendment cases, all of which applied the two-part abrogation test set forth in *Seminole Tribe*. The court also relied upon the holding of *Seminole Tribe* that Congress may abrogate a state's sovereign immunity only under § 5 of the Fourteenth Amendment. *See* *Autio v. AFSCME, Local 3139*, 140 F.3d 802, 804-05 (8th Cir. 1998), *reh'g en banc granted, opinion and judgment vacated*, 140 F.3d at 806 (order of July 7, 1998), *on reh'g en banc*, 157 F.3d 1141 (8th Cir. 1998); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824-26 (8th Cir. 1998); *Alsbrook v. City of Maumelle*, 156 F.3d 825, 829 (8th Cir. 1998), *reh'g en banc granted, opinion and judgment vacated*, 156 F.3d at 833 (order of Nov. 12, 1998), *on reh'g on banc*, 184 F.3d 999 (8th Cir. 1999); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 821 (8th Cir. 1999). *Autio*, *Humenansky*, *Alsbrook*, and *Mauney*, however, are better characterized as applications of *City of Boerne*. *See* discussion *infra* Parts II.D.2, 4-6.

509. 154 F.3d 865 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999).

Rodgers, an Arkansas resident, brought a (*qui tam*)⁵¹⁰ action against the State of Arkansas and the Arkansas Department of Education (collectively, the state) under the False Claims Act.⁵¹¹ Rodgers alleged that the state had falsely claimed compliance with federal civil rights laws and, thereby, had wrongfully received federal funds conditioned on such compliance.⁵¹² The United States did not intervene as a party to the suit.⁵¹³ Asserting Eleventh Amendment immunity, the state moved to dismiss the suit.⁵¹⁴

The Eighth Circuit⁵¹⁵ initially established that the Eleventh Amendment does not bar the United States from bringing suit against the states.⁵¹⁶ Therefore, whether Arkansas was immune from suit under the Eleventh Amendment turned on whether Rodgers' suit under the *qui tam* provisions of the False Claims Act could be characterized as a suit by the United States.⁵¹⁷ The court determined, based on the "superior . . . role of the government in the prosecution of (*qui tam*) suits,"⁵¹⁸ that a *qui tam* action under the False Claims Act "is a suit by the United States for Eleventh Amendment immunity purposes."⁵¹⁹

510. See *supra* note 150 for an explanation of *qui tam* actions generally and under the False Claims Act.

511. See 154 F.3d 865. See also 31 U.S.C. §§ 3729-33 (1994) and *supra* notes 150-55 for the text of various provisions of the False Claims Act.

512. See *id.* at 867.

513. See *id.* See also generally 31 U.S.C. § 3730(b)(4)(B) (1994) (giving the United States the option of "declin[ing] to take over the [*qui tam*] action, in which case the person bringing the action shall have the right to conduct the action").

514. See *Rodgers*, 154 F.3d at 866-67.

515. Judge Richard S. Arnold writing for a two-judge majority. Judge Panner, sitting by designation, dissented on the basis that he believed Arkansas was entitled to Eleventh Amendment immunity against the *qui tam* relators. See *Rodgers*, 154 F.3d at 869 (Panner, J., dissenting); see also *infra* text accompanying notes 520-21.

516. See *Rodgers*, 154 F.3d at 867 (citing *United States v. Mississippi*, 380 U.S. 128, 138-41 (1964) (stating that "nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States")).

517. See *id.*

518. *Id.* at 868. The court cited to various portions of § 3730 granting the government a "superior role" in *qui tam* actions: § 3730(b)(5), (c)(3) (establishing that only the government has a right to intervene, and if it does not intervene within a 60-day period, allowing it to intervene upon a showing of good cause); § 3730(c)(1) (providing that, "[i]f the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action."); § 3730(c)(2)(A)-(B) (allowing the government to dismiss or settle the action "notwithstanding the objections of the person initiating the action"); § 3730(d) (establishing that, whether or not the government conducts the action, it will receive the bulk of the proceeds).

519. *Rodgers*, 154 F.3d at 868. The court distinguished the present case from its holding in *Moad*. See *id.* (citing *Moad*, 111 F.3d 585, 586). The court characterized *Moad* as a determination that the Eleventh Amendment, in light of *Seminole Tribe*, bars suits against the

The dissent disagreed with the majority's determination that the *qui tam* action against Arkansas was not "commenced or prosecuted" by a private citizen.⁵²⁰ Because the United States had little control over Rodgers' *qui tam* action, and because the Supreme Court had given the Eleventh Amendment a broad reading in cases like *Seminole Tribe*, the dissent would have held that Rodgers was the real party in interest and, therefore, that Arkansas was immune from suit.⁵²¹

states under the FLSA because the Interstate Commerce Clause, pursuant to which the FLSA was enacted, "is an impermissible basis for the abrogation of state immunity under the Eleventh Amendment." *Id.* *Moad*, said the court, was not controlling because the real party in interest bringing that suit was a private person, not the United States. *See id.*

520. *Rodgers*, 154 F.3d at 869 (Panner, J., dissenting) (quoting U.S. CONST. amend. XI).

521. *See id.* The dissent also distinguished *Rodgers* from *Zissler*, which was decided on the same day by the same panel of judges. *See Rodgers*, 154 F.3d at 870 (citing *Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870 (8th Cir. 1998)). The court stated that the United States "has intervened and is prosecuting that action at the instance, and under the control, of responsible federal officials." *Id.* In *Zissler*, the court, in addition to disposing of an argument based on *New York* that the False Claims Act impermissibly coerces the states, relied upon *Rodgers* in holding that if "a State has no Eleventh Amendment immunity against a *qui tam* suit filed under [the False Claims Act], even when the United States has chosen not to intervene," then a fortiori a state has no immunity when the United States has intervened. *Zissler*, 154 F.3d at 872 (citing *Rodgers*, 154 F.3d 865). The *Zissler* court also relied upon the Supreme Court's statement in *Seminole Tribe* that the power of the federal government to sue a state in federal court is not hindered by the Eleventh Amendment. *See id.* at 873 (quoting *Seminole Tribe*, 517 U.S. at 71 n.14 ("[T]he Federal Government can bring suit in federal court against a State.")).

Finally, after *Rodgers* and *Zissler*, the Eighth Circuit decided three cases with relatively minor references to *Seminole Tribe*. In *United States v. Weaselhead*, the court cited *Seminole Tribe*, among other cases, for the proposition that Congress' "sweeping, plenary power to regulate Indian affairs under the Indian Commerce Clause . . . remains subject to constitutional limitations." 156 F.3d 818, 824 & n.5 (8th Cir. 1998) (citing *Seminole Tribe*, 517 U.S. at 72-73). In *State ex rel. Nixon v. Coeur D'Alene Tribe*, the Eighth Circuit, in the course of reciting the facts of the case, cited generally to *Seminole Tribe*, apparently in reference to the Supreme Court's explanation of tribal-state compacts under the IGRA. 164 F.3d 1102, 1104 (8th Cir.), *cert. denied*, 119 S. Ct. 2400 (1999). In *Rose v. United States Department of Education* (In re *Rose*), the court determined that "[t]he case before this court does not present a general question of Eleventh Amendment immunity," because the State of Missouri, by filing proofs of claim as a creditor in a Chapter 7 bankruptcy proceeding, had waived its immunity. 187 F.3d 926 (8th Cir. 1999). The court cited to *Seminole Tribe*, inter alia, to support its statement that "[t]he Eleventh Amendment can bar federal actions by private parties against a state unless it has waived its immunity or Congress has abrogated it in a valid exercise of power under the enforcement clause of the Fourteenth Amendment." *Id.* *See supra* Part II.A.5.

D. *City of Boerne v. Flores*

When the Roman Catholic Archbishop of the San Antonio Archdiocese, which encompasses the city of Boerne, Texas,⁵²² applied to the Boerne Historic Landmark Commission for a permit to enlarge St. Peter Catholic Church and was denied, he sued the city in federal court under the Religious Freedom Restoration Act (RFRA).⁵²³ The RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,”⁵²⁴ unless the government demonstrates that “application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.”⁵²⁵ The archbishop argued that the city violated the RFRA by applying its historic districts preservation ordinance to deny the archdiocese a building permit.⁵²⁶ The city challenged the RFRA’s constitutionality on the basis that it was not “appropriate legislation” under section 5 of the Fourteenth Amendment⁵²⁷ for enforcement of the rights guaranteed by section 1 of the amendment.⁵²⁸

As the Supreme Court⁵²⁹ explained, the RFRA was Congress’ reaction to *Employment Division v. Smith*.⁵³⁰ In that case, the Court declined to subject a generally applicable Oregon statute to the *Sherbert v. Verner*⁵³¹ balancing test in determining whether the statute violated the Free Exercise Clause of the

522. To set the record straight at the outset, people familiar with Boerne, Texas, pronounce its name “Bernie.” See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 743 (1998).

523. See *City of Boerne v. Flores*, 521 U.S. 507, 511-12 (1997); see also 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

524. § 2000bb-1(a).

525. § 2000bb-1(b)(1)-(2).

526. See *City of Boerne*, 521 U.S. at 512.

527. See U.S. CONST. amend. XIV, § 5; see also *supra* note 414 for the text of § 5.

528. See *City of Boerne*, 521 U.S. at 517; see also U.S. CONST. amend. XIV, § 1 and *supra* note 412 for the text of § 1.

529. Justice Kennedy wrote the opinion of the Court, in which Chief Justice Rehnquist, and Justices Stevens, Thomas, and Ginsburg joined, and in which Justice Scalia joined in part. Justice Stevens filed a concurring opinion and joined in Justice Scalia’s opinion concurring in part. Justice O’Connor’s dissenting opinion was joined in part by Justice Breyer, who also joined in a dissenting opinion by Justice Souter.

530. 494 U.S. 872 (1990); see also 42 U.S.C. § 2000bb(a)(4) (1994) (stating that “in *Employment Division v. Smith* . . . , the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”) (citation omitted); § 2000bb(b) (stating that a purpose of the RFRA is to “restore the compelling interest test as set forth in *Sherbert v. Verner*”).

531. 374 U.S. 398 (1963) (stating that a state law substantially burdening the free exercise of an individual’s religion violates the Free Exercise Clause of the First Amendment unless a compelling state interest justifies the burden).

First Amendment.⁵³² The *Smith* Court held that when a generally applicable law is challenged on free exercise grounds, the *Sherbert* test is inapt and the law in question “may be applied to religious practices even when not supported by a compelling governmental interest.”⁵³³

Having explained the origins of the RFRA, the Court turned to the issue of the Act’s constitutionality. The Court initially determined that Congress, in enacting the RFRA provisions applicable to the states and their subdivisions – the provisions of the statute relevant to the present case – relied on its enforcement power under section 5 of the Fourteenth Amendment.⁵³⁴ Section 5, said the Court, is “‘a positive grant of legislative power’ to Congress”⁵³⁵ that authorizes “[l]egislation which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the states.’”⁵³⁶ The enforcement power is inherently limited, however, by the text of section 5, which allows Congress the power only “‘to enforce’” the rights protected by the substantive provisions of the Fourteenth Amendment, including the right to free exercise of religion as incorporated into the Due Process Clause of the Fourteenth Amendment.⁵³⁷ The enforcement power, said the Court, is “‘remedial’” and does not include the “power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”⁵³⁸ The Court admitted the difficulty in distinguishing permissible statutes that remedy or prevent Fourteenth Amendment violations from statutes that improperly seek to change the amendment’s substantive protections, but could not escape the fact that “the distinction exists and must be observed.”⁵³⁹ Thus, to avoid the enactment under section 5 of impermissible congressional statutes that are

532. See *City of Boerne*, 521 U.S. at 513-14; see also U.S. CONST. amend. I, cl. 1 (providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there.”).

533. *City of Boerne*, 521 U.S. at 514 (explaining *Smith*, 494 U.S. at 885).

534. See *id.* at 516; see also 42 U.S.C. § 2000bb-2(1) (1994) (defining “government” for the purposes of § 2000bb-1 to include “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State”); 42 U.S.C. § 2000bb-3(a) (1994) (applying the RFRA to “all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the [RFRA’s date of enactment].”).

535. *City of Boerne*, 521 U.S. at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

536. *Id.* at 518 (quoting *Fitzpatrick*, 427 U.S. at 455).

537. *Id.* at 519 (quoting U.S. CONST. amend. XIV, § 5; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that “[t]he fundamental concept of liberty embodied in [the Fourteenth Amendment Due Process Clause] embraces the liberties guaranteed by the First Amendment,” and the Free Exercise Clause therefore is incorporated into Due Process)).

538. *Id.* at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

539. *Id.* at 519-20.

“substantive in operation and effect,” the Court announced the requirement, supported by the history of the Fourteenth Amendment and Supreme Court precedent,⁵⁴⁰ that there be “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁵⁴¹ The RFRA, held the Court, fails this test.⁵⁴²

The Court first noted that the “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”⁵⁴³ Instead, Congress’ findings revealed the absence of deliberate religious persecution over the last forty years and only a few minor instances of “laws of general applicability . . . plac[ing] incidental burdens on religion.”⁵⁴⁴ The RFRA was “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”⁵⁴⁵ The Court pointed out that the RFRA, with its universal application to all levels of government and every kind of government action,⁵⁴⁶ is uniquely disproportionate as compared to other legislation enacted pursuant to Congress’ enforcement power, such as the more targeted provisions of the Voting Rights Act upheld in *South Carolina v. Katzenbach*.⁵⁴⁷ Lastly, the Court determined that, because the RFRA’s heightened scrutiny test⁵⁴⁸ invalidates laws that otherwise would be upheld under *Smith* by design, it forces states to defend legitimate exercises of their traditional police power that are beyond the prohibition of the Free Exercise Clause.⁵⁴⁹ For all of these reasons, said the Court, the RFRA is “broader than is appropriate if the goal is to prevent and remedy constitutional violations.”⁵⁵⁰

Finally, the Court reminded Congress of its “duty to make its own informed judgment about the meaning and force of the Constitution,” and of

540. See *City of Boerne*, 521 U.S. at 520-29.

541. *Id.* at 520.

542. See *id.* at 536.

543. *Id.* at 530.

544. *Id.* at 521 U.S. at 530-31.

545. *City of Boerne*, 521 U.S. at 532.

546. See *supra* note 534.

547. See *City of Boerne*, 521 U.S. at 532-33 (explaining that in *South Carolina v. Katzenbach*, the Court held that the Voting Rights Act of 1965, which includes termination dates, geographic limitations, and congressional findings of egregious and pervasive voting discrimination, is “appropriate legislation” under the Enforcement Clause of the Fifteenth Amendment to effectuate that amendment’s prohibition of racial discrimination in voting). See generally *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

548. The heightened scrutiny test, in addition to its requirement that a state demonstrate a compelling governmental interest, also includes a least-restrictive-means component not previously demanded by *Verner* or the Court’s other pre-*Smith* cases. See *City of Boerne*, 521 U.S. at 535.

549. See *id.* at 534.

550. *Id.* at 535.

the respect to be afforded to the Court's "duty to say what the law is."⁵⁵¹ The Court concluded that because the "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance," the statute is unconstitutional and the Court's holding in *Smith*, not the RFRA, would control the case before the Court.⁵⁵²

1. Montano v. Hedgepeth

The Eighth Circuit's first authoritative treatment⁵⁵³ of *City of Boerne* was *Montano v. Hedgepeth*.⁵⁵⁴ In *Montano*, Nicholas P. Montano, a prisoner at the Iowa State Penitentiary, alleged that the prison chaplain had excluded him from Protestant church services in violation of the RFRA.⁵⁵⁵ Montano was a practitioner of "Messianic Judaism," which combines elements of Judaism and Protestant Christianity, and apparently had been removed from church gatherings for spreading his unorthodox doctrine.⁵⁵⁶

At the outset, the Eighth Circuit⁵⁵⁷ noted the decision of the Supreme Court only one month earlier that "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."⁵⁵⁸ In light of the holding of *City of Boerne*, the Eighth Circuit was

551. *Id.* at 535-36 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.").

552. *City of Boerne*, 521 U.S. at 536.

553. Prior to *Montano*, the Eighth Circuit filed two unpublished, per curiam opinions dealing only briefly with *City of Boerne*. In *Silvey v. Schriro*, the Eighth Circuit declined to hear a Missouri inmate's claim that a prison hair-length regulation violated the RFRA "in light of the Supreme Court's . . . decision declaring the RFRA to be unconstitutional." 117 F.3d 1423, No. 96-2787 1997 WL 397176, at *1 n.1 (8th Cir. Jul. 7, 1997) (per curiam) (unpublished table decision). Likewise, in *Cooper-Bey v. Rogerson*, the court affirmed the dismissal of the claim of Iowa inmates that prison restrictions on group worship violated the RFRA, because "[t]he Supreme Court held RFRA unconstitutional in *City of Boerne v. Flores*." 117 F.3d 1422 No. 96-2774, 1997 WL 401189, (8th Cir. Jul. 17, 1997) (per curiam) (unpublished table decision).

Similarly, in two unpublished prison-litigation cases subsequent to *Montano*, the Eighth Circuit determined that an Iowa prisoner's "claim under the [RFRA] is foreclosed by the recent opinion of the United States Supreme Court in *City of Boerne v. Flores*." *Armento v. Emmett*, 129 F.3d 121 No. 97-212 SI, 1997 WL 611762, (8th Cir. Sept. 30, 1997) (per curiam) (unpublished table decision). Also, the RFRA claim of a South Dakota inmate properly was dismissed because the "RFRA has been declared unconstitutional." *Anders v. Janklow*, 163 F.3d 601, No. 96-2718, 1998 WL 396135 (8th Cir. Jul. 8, 1998) (per curiam) (unpublished table decision).

554. 120 F.3d 844 (8th Cir. 1997).

555. See 42 U.S.C. §§ 2000bb-2000bb-4 (1994).; see also *supra* text accompanying notes 524-25 for the relevant language of the RFRA.

556. See *Montano*, 120 F.3d at 846-47.

557. Judge Floyd R. Gibson wrote for a unanimous three-judge panel.

558. *Montano*, 120 F.3d at 844 n.8 (quoting *City of Boerne*, 521 U.S. at 536).

constrained to conclude that “Montano’s RFRA claim no longer states a viable cause of action.”⁵⁵⁹

2. *Autio v. AFSCME, Local 3139*

In *Autio v. AFSCME, Local 3139*,⁵⁶⁰ Jock Orville Autio sued his employer, the State of Minnesota, in federal court for failing to accommodate Autio’s physical disabilities as required under the Americans with Disabilities Act (ADA).⁵⁶¹ Minnesota moved to dismiss the case on the basis that the Eleventh Amendment⁵⁶² barred Autio’s ADA claim from being heard in federal court.⁵⁶³ After the district court denied its motion, the state appealed.⁵⁶⁴

The Eighth Circuit panel⁵⁶⁵ began by noting that, although the Eleventh Amendment normally immunizes a state from suit in federal court by its own citizens, a state’s immunity is subject to waiver by the state or abrogation by Congress.⁵⁶⁶ Autio conceded that Minnesota had not waived its sovereign immunity, and thus the court had to determine whether Congress, in enacting the ADA, had properly abrogated the state’s immunity.⁵⁶⁷ To answer this question, the Eighth Circuit applied the *Seminole Tribe* abrogation test requiring Congress to “unequivocally express[] an intent to abrogate Eleventh Amendment immunity. . . . [and to] act[] pursuant to a valid exercise of

559. *Id.* Just a few weeks after *Montano*, the Eighth Circuit decided *Gavin v. Branstad*, another prison-litigation case. See 122 F.3d 1081 (8th Cir. 1997). In *Gavin*, inmates of the Iowa State Prison challenged, as a violation of the separation-of-powers doctrine, the Prison Litigation Reform Act (PLRA), which threatened to terminate injunctive relief won by the inmates in a previous Eighth Amendment action against prison officials. In the course of its analysis, the Eighth Circuit cited to *City of Boerne* for the proposition that the PLRA could not have amended the substantive constitutional law upon which the prisoners’ injunction was based because Congress has no power to do so. See *id.* at 1086 (quoting *City of Boerne*, 521 U.S. at 532 (rejecting the RFRA as an attempt to make “a substantive change in constitutional protections”)).

560. 140 F.3d 802 (8th Cir. 1998), *reh’g en banc granted, opinion and judgment vacated*, 140 F.3d at 806 (order of July 7, 1998), *on reh’g en banc*, 157 F.3d 1141 (8th Cir. 1998).

561. See 42 U.S.C. § 12112(a) (1994) (prohibiting employment discrimination “against a qualified individual with a disability because of the disability of such individual”). Autio also sued his union local for failing to assist him in pursuing his claims against the state, hence the caption of the case appears as it does. See *Autio*, 140 F.3d at 803.

562. See U.S. CONST. amend. XI; see also *supra* note 394 for the text of the Eleventh Amendment.

563. See *Autio*, 140 F.3d at 803.

564. See *id.*

565. Judge Gerald W. Heaney, writing for a unanimous three-judge panel.

566. See *Autio*, 140 F.3d at 803 (citing *Atascadero*, 473 U.S. at 239-41 (holding that Congress did not abrogate the states’ sovereign immunity in § 504 of the Rehabilitation Act, and that California did not waive its immunity or consent to suit in federal court)).

567. See *id.* at 803-04.

power.”⁵⁶⁸ The Eighth Circuit determined that Congress clearly intended to abrogate the states’ sovereign immunity,⁵⁶⁹ and proceeded to the more difficult question of Congress’ authority to do so.⁵⁷⁰ The purpose of the ADA being the extension of equal protection to disabled individuals,⁵⁷¹ the court determined that the statute was an exercise of Congress’ power under section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.⁵⁷²

The state’s argument, predicated on *City of Boerne*, was that the ADA is not an appropriate remedial measure to enforce the Equal Protection Clause “because it prohibits more than what a court might find unconstitutional.”⁵⁷³ The Eighth Circuit explained that the Supreme Court struck down the RFRA in *City of Boerne* in part because the legislative record was devoid of modern instances of religious persecution under state action.⁵⁷⁴ Thus, the Supreme Court had concluded that Congress, in enacting the RFRA, was not merely enforcing a recognized Fourteenth Amendment right, but was attempting to change the substance of the Fourteenth Amendment.⁵⁷⁵ To ensure that legislation enacted under Congress’ enforcement power is remedial and not substantive, the Supreme Court required that there “‘be a congruence between the means used and the ends to be achieved . . . [and that] [t]he appropriateness of remedial measures . . . be considered in light of the evil presented.’”⁵⁷⁶

The Eighth Circuit distinguished the ADA from the RFRA on the basis that “the ADA clearly chronicles and directly addresses the discrimination people with disabilities have experienced and the ‘evils’ those with disabilities continue to experience in modern day America.”⁵⁷⁷ Furthermore, “[i]n passing the ADA, Congress was not attempting to make a substantive constitutional

568. *Id.* at 804 (citing *Seminole Tribe*, 517 U.S. at 55-56); see also *supra* note 486, briefly discussing the *Autio* court’s application of *Seminole Tribe*.

569. See 42 U.S.C. § 12202 (1994) (“A state shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.”).

570. See *Autio*, 140 F.3d at 804.

571. See 42 U.S.C. § 12101(b)(4) (1994) (stating that a purpose of the ADA is “to invoke the . . . power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities”).

572. See U.S. CONST. amend. XIV, §§ 5, 1; see also *supra* notes 414 and 412 for the text of § 5 and the Equal Protection Clause, respectively.

573. *Autio*, 140 F.3d at 804.

574. See *id.* (quoting *City of Boerne*, 521 U.S. at 530 (“RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.”)).

575. See *Autio*, 140 F.3d at 804.

576. *Id.* (quoting *City of Boerne*, 521 U.S. at 530).

577. *Autio*, 140 F.3d at 804-05; see also 42 U.S.C. § 12101(a)(2) (finding that “society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem”).

change. Rather, it was attempting to enforce a recognized Fourteenth Amendment right: equal protection.⁵⁷⁸ According to the Eighth Circuit, Congress may exercise its enforcement power to prohibit state action that has not been determined by a court to be a constitutional violation, as it did in the ADA.⁵⁷⁹ As the Supreme Court stated in *City of Boerne*, and the Eighth Circuit repeated, “[L]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the states.”⁵⁸⁰

The state argued, nonetheless, that Congress overstepped the bounds of its section 5 power by protecting rights in the ADA that are not associated with a quasi-suspect or suspect class for purposes of equal protection analysis.⁵⁸¹ The Eighth Circuit noted, however, that “other laws passed by Congress have been upheld as constitutionally abrogating Eleventh Amendment immunity even though the rights protected are not grounded in quasi-suspect or suspect classification.”⁵⁸² The Supreme Court’s plurality opinion in *City of Cleburne v. Cleburne Living Center*⁵⁸³ was further evidence, said the Eighth Circuit, that the ADA is consistent with the constitutional principle of equal protection as interpreted by the Supreme Court.⁵⁸⁴ For all of these reasons, the Eighth Circuit held that Congress did not exceed its enforcement power under section 5 when enacting the ADA.⁵⁸⁵ Consequently, Autio was entitled to bring his ADA action against Minnesota in federal court.⁵⁸⁶

The opinion handed down by the three-judge panel of the Eighth Circuit in *Autio* was not the court’s final word on the case. Three months after the panel’s opinion was filed, the Eighth Circuit voted to rehear the case en banc

578. See *Autio*, 140 F.3d at 805.

579. *Id.*

580. *Id.* (quoting *City of Boerne*, 521 U.S. at 518 (internal quotation and citation omitted)).

581. See *id.* at 805.

582. *Autio*, 140 F.3d at 805. The other laws to which the court referred are the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1994) (prohibiting employment discrimination based on age), and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1491 (West Supp. 1999) (providing that all children with disabilities shall have access to a “free appropriate public education”). See *id.* at 805 n.5. For the Eighth Circuit’s subsequent treatment of the ADEA and IDEA in light of *City of Boerne*, see *infra* Part II.D.4-5.

583. See 473 U.S. 432 (1985) (holding that, although state regulations regarding the mentally retarded are not subject to heightened scrutiny under the Equal Protection Clause, a city ordinance requiring a special use permit for group homes for the mentally retarded had no rational basis and violates equal protection).

584. See *Autio*, 140 F.3d at 806.

585. See *id.*

586. See *id.*

and vacated the panel opinion and judgment.⁵⁸⁷ The court's rehearing of the case did not yield another opinion, however, because the court was evenly divided on the issue.⁵⁸⁸ Accordingly, the Eighth Circuit summarily affirmed the district court's judgment denying Minnesota's motion to dismiss.⁵⁸⁹

3. Christians v. Crystal Evangelical Free Church (In re *Young*)

In *Christians v. Crystal Evangelical Free Church* (In re *Young*),⁵⁹⁰ the trustee of Bruce and Nancy Young's bankruptcy estate, Julia A. Christians, claimed that the RFRA⁵⁹¹ is unconstitutional as it applies to federal bankruptcy law, and therefore, does not bar recovery of the Youngs' tithes to their church as avoidable transfers under the Bankruptcy Code.⁵⁹² On its first hearing of *In re Young*,⁵⁹³ the Eighth Circuit determined, based on the RFRA, that recovery by the bankruptcy trustee of the Youngs' tithes "substantially burdens the debtors' free exercise of their religion and is not in furtherance of a compelling governmental interest."⁵⁹⁴ While the trustee's subsequent petition for certiorari to the Supreme Court was pending, the Court struck down the RFRA "as applied to *state law* because Congress had exceeded its enforcement powers under section 5 of the Fourteenth Amendment."⁵⁹⁵ The Court thereafter granted the trustee's petition and summarily vacated and remanded the case to the Eighth Circuit for further consideration in light of *City of Boerne*.⁵⁹⁶ On remand, the trustee argued that the RFRA violates the separation-of-powers

587. See *id.* (order of July 7, 1998, granting rehearing en banc and vacating opinion and judgment of April 9, 1998).

588. See *Autio v. AFSCME, Local 3139*, 157 F.3d 1141 (8th Cir. 1998) (en banc).

589. See *id.* at 1141.

590. 141 F.3d 854 (8th Cir. 1998).

591. See 42 U.S.C. §§ 2000bb–2000bb-4. See also *supra* text accompanying notes 524–25 for the pertinent text of the RFRA.

592. See *In re Young*, 141 F.3d at 857, 859, 861; see also 11 U.S.C. § 548(a), providing:

(a)(1) The [bankruptcy] trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

.....

(B)(1) received less than a reasonably equivalent value in exchange for such transfer or obligation

Id.

593. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997); see also Rachel A. Wilson, Note, *Bankrupt Tithers, the Eighth Circuit & the Supreme Court: Still Praying for RFRA Relief from Bankruptcy Law*, 62 MO. L. REV. 629 (1997), for a discussion of the Eighth Circuit's first decision of *In re Young* and the implications of the Supreme Court's remand of the case in light of *City of Boerne*.

594. *In re Young*, 82 F.3d at 1417.

595. *In re Young*, 141 F.3d at 856.

596. See *Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997).

doctrine and the Establishment Clause of the First Amendment and, therefore, is unconstitutional in its application to federal law.⁵⁹⁷

The Eighth Circuit⁵⁹⁸ recognized the RFRA as a legislative response to *Smith*, in which the Supreme Court “effectively overruled precedent that had provided greater protection to individuals whose religious practices were burdened by the operation of neutral laws.”⁵⁹⁹ As the Eighth Circuit explained, the RFRA was meant to reinstate, as to both federal and state law, the compelling interest test rejected in *Smith*.⁶⁰⁰ Doubts as to whether Congress had the power to apply the RFRA to state law were confirmed, however, when the Supreme Court declared in *City of Boerne* that “ ‘the most far reaching and substantial of the RFRA’s provisions, those which impose its requirements on the states,’ ‘exceed Congress’ enforcement power under section 5 of the Fourteenth Amendment.’”⁶⁰¹ The enforcement power, explained the Eighth Circuit, “is remedial and only allows Congress to preserve rights already protected by the Fourteenth Amendment.”⁶⁰² Thus, the Supreme Court struck down the RFRA “[b]ecause RFRA’s protection went far beyond the protection offered by the *Smith* Court’s authoritative interpretation of the First Amendment, as incorporated into the Fourteenth Amendment.”⁶⁰³ As the Eighth Circuit explained, however, the *City of Boerne* Court did not reach the issue of Congress’ authority to apply the RFRA to federal law, as opposed to state law.⁶⁰⁴

Having determined that the RFRA had survived *City of Boerne* with respect to federal law, the Eighth Circuit proceeded to hear the trustee’s

597. See *In re Young*, 141 F.3d at 857; see also U.S. CONST. amend. I, and *infra* text accompanying note 607 for the text of the Establishment Clause.

598. Judge Magill, writing for a two-judge majority. Judge Andrew W. Bogue, a district court judge sitting by designation, dissented on the basis that the RFRA, as applied to federal law, is unconstitutional on separation of powers grounds. See *In re Young*, 141 F.3d at 863 (Bogue, J., dissenting); see also *infra* text accompanying notes 609-12 for a summary of Judge Bogue’s dissent.

599. *In re Young*, 141 F.3d at 857-58 (quoting *Smith*, 494 U.S. at 879) (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” (internal quotations omitted)).

600. See *id.* at 858; see also *supra* note 534 for the text of 42 U.S.C. §§ 2000bb-3(a), 2000bb-2(1) (1994).

601. *In re Young*, 141 F.3d at 858 (quoting *City of Boerne*, 521 U.S. at 516).

602. *Id.* at 858.

603. *Id.* (quoting *City of Boerne*, 521 U.S. at 519, 523. (“Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. . . RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.”))

604. See *id.* at 859.

constitutional challenges to the statute.⁶⁰⁵ The Eighth Circuit ultimately held that Congress had sufficient authority under the Bankruptcy Clause⁶⁰⁶ and the Necessary and Proper Clause⁶⁰⁷ to make the RFRA applicable to federal bankruptcy law, and that the RFRA does not violate the Establishment Clause.⁶⁰⁸

The dissent argued that, in *City of Boerne*, the Supreme Court did not merely declare the RFRA an unconstitutional exercise of Congress' enforcement power *vis-a-vis* the states. Rather, the Supreme Court decided that the RFRA "intrud[ed] upon the core function of the judicial branch, thereby offending 'vital principles necessary to maintain separation of powers.'"⁶⁰⁹ As the *City of Boerne* Court had explained, "[W]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is,"⁶¹⁰ and, therefore, according to the dissent, Congress' attempt to overturn the Court's decision in *Smith* and reimpose the compelling-interest standard of review in the RFRA "intruded upon, and usurped a core function of the Article III branch."⁶¹¹ Thus, the dissent would have held that the RFRA violates the separation-of-powers doctrine and is unconstitutional as applied to federal law.⁶¹²

4. *Humenansky v. Regents of the University of Minnesota*

In *Humenansky v. Regents of the University of the Minnesota*,⁶¹³ John Humenansky sued his former employer, the University of Minnesota, in federal court under the Age Discrimination in Employment Act (ADEA).⁶¹⁴

605. *See id.*

606. *See* U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States").

607. *See* U.S. CONST. art. I, § 8, cl. 1, (stating that Congress shall have the power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof").

608. *See In re Young*, 141 F.3d at 860-63.

609. *Id.* at 863 (Bogue, J., dissenting) (quoting *City of Boerne*, 521 U.S. at 536).

610. *Id.* at 864 (Bogue, J., dissenting) (quoting *City of Boerne*, 521 U.S. at 536).

611. *Id.* at 865 (Bogue, J., dissenting).

612. *See id.* at 867 (Bogue, J., dissenting).

613. 152 F.3d 822 (8th Cir. 1998).

614. *See* 29 U.S.C. § 623(a) (1994), which provides:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Humenansky claimed that the university had violated the ADEA when it terminated his employment.⁶¹⁵ The university answered that Humenansky's suit was barred by the Eleventh Amendment because "Congress neither intended to abrogate Eleventh Amendment immunity nor acted under section 5 of the Fourteenth Amendment in enacting 1974 amendments that extended the ADEA to cover public employers."⁶¹⁶

The Eighth Circuit⁶¹⁷ applied the first prong of the *Seminole Tribe* two-part abrogation test and determined that "the ADEA's text does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity."⁶¹⁸ Furthermore, applying the second half of the *Seminole Tribe* test, the court stated that "[e]ven if the ADEA's text contained a sufficiently clear expression of intent to abrogate, we conclude that Congress lacked the power to abrogate Eleventh Amendment immunity."⁶¹⁹ The court explained that, although Congress cannot rely on its powers under Article I of the Constitution to abrogate Eleventh Amendment immunity, it may abrogate pursuant to section 5 of the Fourteenth Amendment, "'a positive grant of legislative power' to enforce section 1 of the Fourteenth Amendment."⁶²⁰ Thus, the question for the court was whether the ADEA is "'plainly adapted'" to enforcing the Equal Protection Clause of the Fourteenth Amendment.⁶²¹ The court recognized that legislative distinctions based on age are not subject to heightened equal protection scrutiny.⁶²² It surmised that the Supreme Court would not accept an expansive view of the section 5 enforcement power allowing Congress to statutorily prohibit distinctions based on age that would not violate the Constitution. In particular, the court relied upon the Supreme Court's determination in *City of Boerne* "that Congress' section 5 powers, while broad, are not without limits" and quoted *City of Boerne* at length:

"'Congress' power under section 5 . . . extends only to 'enforcing' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' The design of the Amendment and the text of section 5 are

Id.

615. *Humenansky*, 152 F.3d at 824.

616. *Id.*

617. Judge James B. Loken, writing for a two-judge majority. Judge Joseph F. Bataillon, a district court judge sitting by designation, dissented on the grounds that Congress expressed an unmistakably clear intent to abrogate Eleventh Amendment immunity and the ADEA was a valid exercise of the enforcement power under § 5 of the Fourteenth Amendment. *See id.* at 828 (Bataillon, J., dissenting); *see also infra* text accompanying notes 628-31 for details of Judge Bataillon's dissent.

618. *Humenansky*, 152 F.3d at 824-25 (citing 29 U.S.C. § 626(c) (1994) (generally authorizing enforcement of the ADEA "in any court of competent jurisdiction")).

619. *Id.* at 826.

620. *Id.* (quoting *City of Boerne*, 521 U.S. at 517).

621. *Id.* (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

622. *See id.*

inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."⁶²³

The Eighth Circuit explained that the *City of Boerne* Court went on to strike down the RFRA because it "'is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'"⁶²⁴ Accordingly, the Eighth Circuit concluded that "the ADEA likewise exceeds Congress's section 5 powers as defined in *City of Boerne*."⁶²⁵ Humenansky therefore could not maintain his ADEA suit against the University of Minnesota in federal court.

The dissent disagreed with the majority's conclusions that Congress failed to express an unmistakably clear intent to abrogate state sovereign immunity and that the ADEA exceeds Congress' enforcement power.⁶²⁶ It argued that direct reference to the states in the text of the ADEA sufficiently expressed Congress' intent to abrogate state immunity.⁶²⁷ Furthermore, regarding Congress' power to enact the ADEA, the dissent distinguished the ADEA from the RFRA on the basis that "the ADEA [is] not 'so out of proportion' to the problems of arbitrary age discrimination identified by Congress."⁶²⁸ Relying heavily on the Eighth Circuit panel decision in *Autio*, which upheld the ADA as a constitutional exercise of Congress' enforcement power, the dissent would have held that "the ADEA is plainly adapted to the end of providing older workers equal protection under the law."⁶²⁹

623. *Humenasky*, 152 F.3d at 828 (quoting *City of Boerne*, 521 U.S. at 519).

624. *Id.* at 828 (quoting *City of Boerne*, 521 U.S. at 519).

625. *Id.* (citing *EEOC v. Wyoming*, 460 U.S. 226, 262-63 (1983) (Burger, C.J., dissenting) (stating, for a four-justice minority, that the ADEA cannot be sustained as an exercise of Congress' § 5 power to enforce the Equal Protection Clause)).

626. *See id.* (Bataillon, J., dissenting).

627. *See id.* at 829 (Bataillon, J., dissenting) (quoting *Seminole Tribe*, 517 U.S. at 57 ("[T]he numerous references to the 'State' in the text of [the RFRA] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit."), and citing 29 U.S.C. § 630(b)(2) (1994) (defining "employer" for the purposes of the ADEA to include "a State or political subdivision of a State and any agency or instrumentality of a State") and § 630(f) (defining "employee" for the purposes of the ADEA to include state employees)).

628. *Humenansky*, 152 F.3d at 831 (Bataillon, J. dissenting) (quoting *City of Boerne*, 521 U.S. at 532).

629. *Id.* at 830-31 (Bataillon, J., dissenting). The dissent stated:

Unlike the RFRA, the ADA clearly chronicles and directly addresses the discrimination people with disabilities have experienced and the 'evils' those with disabilities continue to experience in modern day America Unlike the RFRA struck down in [*City of Boerne*], the ADA is 'plainly adapted' as a remedial measure even though each individual violation of the ADA may not in and of itself be

5. Little Rock School District v. Mauney

Mr. and Ms. James Mauney sued the State of Arkansas and the Arkansas Department of Education (collectively, the state) under the Individuals with Disabilities Education Act (IDEA),⁶³⁰ seeking an appropriate public education for their severely disabled son.⁶³¹ The state argued that the Eleventh Amendment bars the Mauneys' suit because Congress does not have the power under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity in the IDEA.⁶³²

First the Eighth Circuit⁶³³ recognized that "Congress may, when acting pursuant to its enforcement power under section 5 of the Fourteenth Amendment, abrogate Eleventh Amendment immunity without the states' consent."⁶³⁴ Applying the now familiar *Seminole Tribe* two-part abrogation test, the court determined that Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity in the IDEA,⁶³⁵ and

unconstitutional . . . [T]he ADA is plainly adapted to the end of providing those with disabilities equal protection under the law.

Id. (quoting *Autio*, 140 F.3d at 804-05).

Following its decision in *Humenansky*, the Eighth Circuit filed several opinions with cursory references to *City of Boerne*. In *United States v. Weaselhead*, the Eighth Circuit determined that a congressional attempt to statutorily redefine the inherent sovereignty of the Indian tribes exceeds Congress' power under the Indian Commerce Clause. See 156 F.3d 818 (8th Cir. 1998). It quoted *City of Boerne* in support of its statement that "[f]undamental, ab initio matters of constitutional history should not be committed to '[s]hifting legislative majorities' free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another." *Id.* at 824 (quoting *City of Boerne*, 521 U.S. at 529). Less than one week later, in *Peter v. Wedl*, the court simply noted that "[f]ollowing the Supreme Court's decision that RFRA is unconstitutional as applied to state law, the plaintiffs abandoned their RFRA claim." 155 F.3d 992, 996 (8th Cir. 1998) (citing *City of Boerne*, 521 U.S. at 536) (internal citation omitted).

630. See generally 20 U.S.C. §§ 1400-1491 (1994 & Supp. 1999) (providing that all children with disabilities shall have access to a "free appropriate public education").

631. See *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999).

632. See *id.*

633. Judge Heaney wrote for a two-judge majority. Judge Wollman concurred in part and dissented in part. Judge Wollman disagreed with the court's conclusion that Congress properly abrogated the states' Eleventh Amendment immunity under § 5 of the Fourteenth Amendment. See *id.* at 832 (Wollman, J., dissenting); see also text accompanying note 652 *infra* for Judge Wollman's opinion.

634. *Mauney*, 183 F.3d at 821 (citing *Seminole Tribe*, 517 U.S. at 59). In response to the state's contention that, because the IDEA is more properly characterized as an exercise of Congress' power under the Spending Clause, the statute cannot be an exercise of the enforcement power, the court noted that "Congress does not have to correctly surmise the source of its authority in order to pass legislation, and may ground its legislative authority in multiple sources." *Id.* at 831 (citing *Crawford*, 109 F.3d at 1283).

635. See *id.* at 822 (citing 20 U.S.C. § 1403(a) (1994 & Supp. 1999) (providing that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter"))).

proceeded to the issue of Congress' authority to enact the IDEA under section 5.⁶³⁶ Dismissing the state's contention that *City of Boerne* limited Congress' ability to legislate pursuant to the Fourteenth Amendment, the court stated that "[w]e read *City of Boerne* to stand for the unexceptional proposition that Congress may not subvert the judiciary's interpretation of the substantive meaning of the Constitution and the judiciary may not abdicate to another branch its role as final arbiter of the substantive meaning of the Fourteenth Amendment."⁶³⁷ According to the Eighth Circuit, *City of Boerne* turned on the fact that the RFRA was intended to overrule the Supreme Court's *Smith* decision,⁶³⁸ and is not a severe limit on Congress' Fourteenth Amendment enforcement power, but instead a reaffirmation of the breadth of that power.⁶³⁹

The Eighth Circuit next applied *City of Boerne*'s requirement that there "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁶⁴⁰ According to the Eighth Circuit, the "congruence" prong of the *City of Boerne* analysis, "tests whether a congressional enactment is remedial in nature or whether it 'imposes new substantive constitutional rights through legislation.'"⁶⁴¹ The Eighth Circuit noted the legislative history of the IDEA documenting Congress' findings regarding disabled children in public schools and contrasted the IDEA with the RFRA on that basis.⁶⁴² Furthermore, the court rejected the state's argument that, because disabled people are not a suspect or quasi-suspect class for the purposes of the Equal Protection Clause,⁶⁴³ Congress lacks the power under

636. See *id.* (citing *Seminole Tribe*, 517 U.S. at 59, 66-67).

637. *Id.* at 823.

638. See *id.* at 826 ("Congress' express purpose [in passing the RFRA]—the motivation that the Court found fatal—was to overrule the Supreme Court's decision in *Smith* and alter its interpretation of substantive constitutional law." (alteration added)).

639. See *Mauney*, 183 F.3d at 824 (quoting *City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.")) (internal quotation omitted)).

640. *Id.* (quoting *City of Boerne*, 517 U.S. at 520).

641. *Id.* at 825 (quoting *Goshtasby v. Board of Trustees*, 141 F.3d 761, 769 (7th Cir. 1998)).

642. See *id.* at 825-26 (quoting 20 U.S.C. § 1400(b)(1) (1994 & Supp. 1999) (finding that "there are more than eight million children with disabilities in the United States today"); § 1400(b)(3) (finding that "more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity"); § 1400(b)(4) (finding that "one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers"); § 1400(b)(9) (finding that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law"))).

643. See *id.* at 826 (citing *City of Cleburne*, 473 U.S. 432); see also U.S. CONST. amend. XIV, § 1 and note 412 *supra* for the text of the Equal Protection Clause.

section 5 to enact legislation benefiting the disabled.⁶⁴⁴ The Eighth Circuit explained that “Congress is not limited to legislating on behalf of groups identified as suspect for purposes of judicial review. To hold otherwise would be to confuse a level of judicial scrutiny with the scope of congressional power.”⁶⁴⁵ For these reasons, the court concluded that “the IDEA is congruent with the dictates of equal protection law” for the purposes of *City of Boerne*.⁶⁴⁶

Proceeding to the “proportionality” prong of the *City of Boerne* analysis, the Eighth Circuit asked “whether the reach of the enactment is so out of proportion with the harm sought to be remedied that the Act becomes substantive in operation and effect.”⁶⁴⁷ The court accorded deference to Congress’ legislative judgment and distinguished the IDEA from the RFRA based on the RFRA’s “[s]weeping coverage . . . at every level of government” and the “substantial costs RFRA exacts . . . in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional regulatory power.”⁶⁴⁸ The court noted that unlike the RFRA, the IDEA conditions federal funding on state compliance with the statute’s requirements, and therefore “functions as a contract between equals.”⁶⁴⁹ Having determined that the IDEA does not exceed Congress’ enforcement power, the court held that Congress properly abrogated the states’ sovereign immunity.⁶⁵⁰

In the alternative, the Eighth Circuit considered whether Arkansas impliedly waived its sovereign immunity under the IDEA. The court determined that the IDEA “manifest[s] a clear intent [on the part of Congress] to condition participation in the programs funded under the Act on a state’s consent to waive its constitutional immunity.”⁶⁵¹ Therefore, Arkansas, by participating in the legislative scheme established in the IDEA, waived its immunity to suit under that statute.

The dissent, although it agreed with the court’s determination that Congress unequivocally expressed its intent to abrogate the states’ Eleventh Amendment immunity in the IDEA, would have held that such abrogation

644. *See Mauney*, 183 F.3d at 826.

645. *Id.* at 828.

646. *Id.* at 829.

647. *Id.* (quoting *City of Boerne*, 521 U.S. at 532 (“RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”)).

648. *Id.* at 830 (quoting *City of Boerne*, 521 U.S. at 532, 534).

649. *Mauney*, 183 F.3d at 830 (citing 20 U.S.C. § 1412 (1994 & Supp. 1999) (providing that, in order to qualify for federal funds under the IDEA, a state must demonstrate that it has met certain enumerated requirements, including that “[t]he State has in effect a policy that assures all children with disabilities the right to a free appropriate public education”)).

650. *See id.* at 831.

651. *Id.* at 832 (quoting *Atascadero*, 473 U.S. at 24 and citing § 1403).

exceeded Congress' section 5 power based on "the interpretation of *City of Boerne* expressed in *Humenansky*."⁶⁵²

6. *Alsbrook v. City of Maumelle*

Christopher Alsbrook sued his employer, the City of Maumelle, Arkansas,⁶⁵³ claiming that the city violated Title II of the ADA⁶⁵⁴ when it barred him from engaging in law enforcement duties because his eyesight could not be corrected to 20/20.⁶⁵⁵ In the Eighth Circuits' first hearing of *Alsbrook*, a panel of the court⁶⁵⁶ determined that Congress, by enacting the ADA and abrogating state sovereign immunity to suits under that statute, did not exceed its section 5 enforcement power. Therefore, Alsbrook's suit was not barred by the Eleventh Amendment and could proceed in federal court.⁶⁵⁷

On rehearing en banc,⁶⁵⁸ the Eighth Circuit⁶⁵⁹ began by applying the *Seminole Tribe* two-part abrogation analysis. The court had no problem determining that "Congress, in passing the ADA, 'unequivocally expressed' its intent to abrogate Eleventh Amendment immunity,"⁶⁶⁰ and proceeded to determine whether Congress acted pursuant to a valid exercise of power.⁶⁶¹

The court first noted that, "[f]ollowing *Seminole Tribe*, Congress can abrogate Eleventh Amendment immunity only if it is acting pursuant to its

652. *Id.* (Wollman, J., dissenting) (citing *Humenansky*, 152 F.3d at 822).

653. Alsbrook also sued the State of Arkansas, the Arkansas Commission on Law Enforcement Standards & Training (ACLEST), and the commissioners of ACLEST in their individual and official capacities. For the sake of simplicity, all the defendants are referred to collectively as "the City."

654. See 42 U.S.C. § 12132 (1994) (providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

655. See *Alsbrook v. City of Maumelle*, 156 F.3d 825 (8th Cir. 1998), *reh'g en banc granted, opinion and judgment vacated*, 156 F.3d at 833 (order of Nov. 12, 1998), *rev'd on reh'g en banc*, 184 F.3d 999 (8th Cir. 1999).

656. Judge McMillian wrote for a two-judge majority. Judge C. Arlen Beam dissented on the basis that he would have stayed the decision of *Alsbrook* until the en banc court had decided the similar issue presented in the *Autio* case.

657. See *Alsbrook*, 156 F.3d at 830-31.

658. See *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc).

659. Judge Beam wrote the opinion of the court. Judge McMillian, writing for a four-judge minority, argued that Congress did not exceed its power under § 5 of the Fourteenth Amendment in enacting the ADA and, therefore, properly abrogated state sovereign immunity to suits under the ADA. See *id.* at 1012 (McMillian, J., dissenting); see also *supra* text accompanying notes 682-88 for a summary of the dissenting opinion.

660. *Alsbrook*, 184 F.3d at 1006; see also 42 U.S.C. § 12202 (1994) and *supra* note 569 for the text of § 12202.

661. See *id.*

powers under section 5 of the Fourteenth Amendment.”⁶⁶² Although Congress invoked its section 5 enforcement power in enacting the ADA, the court made it clear that “Congress’s declaration that a statute is passed pursuant to section 5 does not . . . end our inquiry.”⁶⁶³ Rather, the court looked to the operative provisions of the ADA to determine whether “Title II of the ADA represents a proper exercise of Congress’s section 5 powers ‘to enforce’ by ‘appropriate legislation’ the constitutional guarantees of the Fourteenth Amendment, in particular, the Equal Protection Clause.”⁶⁶⁴

The Eighth Circuit referred to *City of Boerne* as “the Supreme Court’s most detailed pronouncement on Congress’s authority to impose legislation on the states pursuant to its section 5 powers,” and noted the Supreme Court’s determination that “‘as broad as the congressional enforcement power is, it is not unlimited.’”⁶⁶⁵ The *City of Boerne* Court had determined that Congress’ section 5 power is remedial and that Congress, therefore, has no authority “to enact substantive legislation defining the scope of the Fourteenth Amendment’s restrictions on the states.”⁶⁶⁶ For congressional legislation to be a valid exercise of Congress’ remedial section 5 power, the Supreme Court required that there be “‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”⁶⁶⁷ Based on the reasoning of the *City of Boerne* Court, the Eighth Circuit concluded that the application of Title II of the ADA to the states was not a proper exercise of Congress’ section 5 enforcement power.⁶⁶⁸

The Eighth Circuit nevertheless acknowledged Alsbrook’s argument that, unlike the RFRA, the ADA contains detailed legislative findings of discrimination against the disabled.⁶⁶⁹ The court explained, however, that “the state of the legislative record, alone, cannot suffice to bring Title II within the ambit of Congress’s section 5 powers if Title II is not ‘adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against.’”⁶⁷⁰ Thus, the court flatly stated that “regardless of the extent of its findings, Congress, under section 5, only has the power to prohibit that which the Fourteenth Amendment prohibits.”⁶⁷¹

662. *Id.*

663. *Id.*

664. *Id.* (quoting U.S. CONST. amend. XIV, § 5).

665. *Alsbrook*, 184 F.3d at 1006-07 (quoting *City of Boerne*, 521 U.S. at 518; *Humenansky*, 152 F.3d at 828 (“Congress’ § 5 powers, while broad, are not without limits.”)).

666. *Id.* at 1007 (quoting *City of Boerne*, 521 U.S. at 519 (“Congress does not enforce a constitutional right by changing what the right is.”)).

667. *Id.* (quoting *City of Boerne*, 521 U.S. at 519).

668. *See id.*

669. *See id.*; *see also* 42 U.S.C. § 12101(a)(2) (1994) and *supra* note 577 for the pertinent text of that section.

670. *Alsbrook*, 184 F.3d at 1008 (quoting *City of Boerne*, 521 U.S. at 532).

671. *Id.*

Likewise, the Eighth Circuit rejected Alsbrook's argument that, because in *Cleburne* the Supreme Court concluded that arbitrary state distinctions based on mental retardation lack a rational basis under the Equal Protection Clause, the ADA, which prohibits discrimination against the disabled, is a valid exercise of Congress' section 5 power.⁶⁷² The Eighth Circuit determined that Title II of the ADA does not "enforce" the rational basis standard applied in *Cleburne*. Rather, the ADA prohibits any state program, service, or activity that fails to provide "reasonable modifications" for the disabled, even though it may be rationally related to a legitimate state interest and valid under *Cleburne*.⁶⁷³ Furthermore, the court was concerned that the application of the ADA to every state program, service, and activity "is a considerable congressional intrusion into the State's traditional prerogatives and general authority to regulate the health and welfare of their citizens."⁶⁷⁴

Finally, the court noted Alsbrook's reliance on the Supreme Court's statement in *City of Boerne* that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States."⁶⁷⁵ The Eighth Circuit determined, however, that the Supreme Court's statement "is best understood as saying that Congress may prohibit conduct which itself is not necessarily unconstitutional, if to do so would rectify an existing constitutional violation."⁶⁷⁶ As the Eighth Circuit noted, Title II of the ADA, rather than specifying particular state laws or actions that violate the Constitution, is aimed indiscriminately at every state law, policy, or program.⁶⁷⁷

Thus, the court determined that "it cannot be said that in applying Title II of the ADA to the states, Congress has acted to enforce equal protection guarantees for the disabled as they have been defined by the Supreme Court."⁶⁷⁸ Accordingly, the court held that the extension of Title II of the ADA to the states was not a proper exercise of Congress' section 5 power and,

672. See *id.* at 1009 (citing *Cleburne*, 473 U.S. at 432).

673. *Id.* (quoting 42 U.S.C. § 12131(2) (1994) (defining a "qualified individual with a disability" for the purposes of the ADA as an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity")).

674. *Id.* (quoting *City of Boerne*, 521 U.S. at 534).

675. *Alsbrook*, 184 F.3d at 1009 (quoting *City of Boerne*, 521 U.S. at 518 (internal quotation omitted)).

676. *Id.*

677. See *id.*

678. *Id.* at 1010.

consequently, that Congress failed properly to abrogate Arkansas' Eleventh Amendment immunity.⁶⁷⁹

The dissent would have held that Congress properly enacted the ADA pursuant to section 5 and, therefore, properly abrogated the Eleventh Amendment.⁶⁸⁰ The dissent argued, based on *Cleburne*, that "protection against disability-based discrimination is a well-established Fourteenth Amendment equal protection guarantee," and disagreed with the majority's determination that Title II does more than merely enforce the rational basis standard applied by the *Cleburne* Court.⁶⁸¹ The dissent relied in large part upon the Supreme Court's statement in *City of Boerne* that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States."⁶⁸² The majority's interpretation of this passage, according to the dissent, ignored "the Supreme Court's reference to legislation which 'deters' constitutional violations and only takes into consideration legislation which 'remedies' constitutional violations."⁶⁸³

Citing congressional findings of persistent and pervasive discrimination against the disabled in public services, programs, and activities,⁶⁸⁴ the dissent argued that Title II of the ADA reflects the requisite "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁶⁸⁵ Thus, the dissent would have concluded that Congress properly exercised its section 5 enforcement powers and that the Eleventh Amendment did not protect the city from Alsbrook's ADA claim.⁶⁸⁶

E. *Printz v. United States*

In *Printz v. United States*,⁶⁸⁷ the Supreme Court considered whether certain interim provisions of the Brady Handgun Violence Prevention Act (Brady Act)⁶⁸⁸ violate the Constitution. The Brady Act requires the U.S. Attorney General to establish a nation-wide background check system for the purchase

679. *See id.*

680. *Alsbrook*, 184 F.3d at 1012 (McMillian, J. dissenting).

681. *Id.* (McMillian, J. dissenting) (citing *Cleburne*, 473 U.S. at 447).

682. *Id.* at 1013 (quoting *City of Boerne*, 521 U.S. at 518 (McMillian, J. dissenting) (internal quotation omitted)).

683. *Id.* (McMillian, J. dissenting).

684. *Id.* at 1014 (McMillian, J. dissenting) (quoting 42 U.S.C. § 12101(a) (1994)).

685. *Alsbrook*, 184 F.3d at 1014 (McMillian, J. dissenting) (quoting *City of Boerne*, 521 U.S. at 520).

686. *Id.* at 1016 (McMillian, J. dissenting).

687. 521 U.S. 898 (1997).

688. *See* 18 U.S.C. § 922(s) (1994).

of handguns.⁶⁸⁹ In the interim, the statute requires that handgun dealers, before selling guns to prospective purchasers, provide the “chief law enforcement officer” of the jurisdiction in which the prospective purchaser resides with a statement containing information relevant to a background check of the prospective purchaser.⁶⁹⁰ The statute then requires that the state officer “make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law.”⁶⁹¹ Jay Printz, the chief law enforcement officer for Ravalli County, Montana, challenged the interim provisions of the Brady Act on the basis that they compel state officers to execute federal law and, therefore, violate the principle of dual sovereignty established in the Constitution.⁶⁹²

The Supreme Court⁶⁹³ noted initially that “there is no constitutional text speaking to this precise question,” and therefore “the answer to [Printz’s] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”⁶⁹⁴ Looking first to statutes enacted by the earliest Congresses, the Court determined that “[t]hese early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions” under Article III and the Supremacy Clause.⁶⁹⁵ The state judiciaries, said the Court, were treated differently from the other branches of state government under the Constitution because, “unlike legislatures and executives, they applied the law of other sovereigns all the time.”⁶⁹⁶ Thus, the Court rejected the argument that “the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service.”⁶⁹⁷ The Court further determined that “there is

689. See note following § 922.

690. 18 U.S.C. § 922(s)(1)(A)(i)(III), (IV).

691. 18 U.S.C. § 922(s)(2).

692. See *Printz*, 521 U.S. at 904, 905.

693. Justice Scalia wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas joined. Justices O’Connor and Thomas filed concurring opinions. Justices Souter, Ginsburg, and Breyer joined Justice Stevens in his dissenting opinion. Justice Souter wrote his own dissenting opinion, as did Justice Breyer, and Justice Stevens joined in Justice Breyer’s dissent.

694. *Printz*, 521 U.S. at 905.

695. *Id.* at 907 (citing, e.g., Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (requiring that state courts record citizenship records); Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577-78 (requiring state courts to deport alien enemies during times of war)); see also U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); U.S. CONST. art. VI, cl. 2. See *supra* note 103 for the text of the Supremacy Clause.

696. *Printz*, 521 U.S. at 905.

697. *Id.* The Court also distinguished its holding in *Testa* on the basis that the Constitution treats state judges differently than other state officers, explaining that “*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the

not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well.”⁶⁹⁸

The government argued, nonetheless, that certain numbers of *The Federalist*, upon which the Court has been known to rely for the original understanding of the Constitution, indicate that Congress may compel enforcement of federal law by state executives.⁶⁹⁹ The government invoked, for example, the statements of Alexander Hamilton that Congress could “‘make use of the State officers and State regulations, for collecting’ federal taxes” and that the new Constitution would “‘enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws.’”⁷⁰⁰ The Court responded, however, that “none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the consent of the States*.”⁷⁰¹

Having determined that “constitutional practice . . . tends to negate the existence of the congressional power asserted here,” the Court proceeded to examine the structure of the Constitution itself for some indication of the constitutionality of the statute at bar.⁷⁰² The Court first noted the principle, reflected throughout the text of the Constitution, that “the Constitution established a system of ‘dual sovereignty.’”⁷⁰³ The Court explained that “the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal

terms of the Supremacy Clause [T]hat says nothing about whether state executive officers must administer federal law.” *Id.* at 928-29 (explaining *Testa*, 330 U.S. at 386).

698. *Id.* at 916.

699. *See id.* at 910.

700. *Id.* (quoting THE FEDERALIST Nos. 36, 27, at 221, 176 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

701. *Printz*, 521 U.S. at 910-11 (citing *FERC*, 456 U.S. at 796 n.35 (O’Connor, J., concurring in part and dissenting in part)).

702. *Id.* at 918.

703. *Id.* (quoting *Gregory*, 501 U.S. at 457 and citing U.S. CONST. art. IV, § 3 (providing that “no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States”); U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies between two or more states; between a State and Citizens of another State;—between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different states, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”);-U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”);-U.S. CONST. art. V (requiring that amendments to the Constitution be “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof”);-U.S. CONST. art. IV § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”);-U.S. CONST. art. I, § 8 (enumerating the powers of Congress);-U.S. CONST. amend. X).

governments would exercise concurrent authority over the people.”⁷⁰⁴ This federal system, said the Court, makes each state government accountable to its citizens⁷⁰⁵ and, by dividing power between two levels of government, reduces the likelihood that power will be abused at either level.⁷⁰⁶ The Court expressed concern that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”⁷⁰⁷

The Court similarly noted that, just as a congressional power to compel state officers to enforce federal law would blur the division of power between the states and the federal government, it would likewise degrade the separation of powers between the coordinate branches of the federal government.⁷⁰⁸ The Court explained that the Constitution grants exclusively to the President the power to execute federal law,⁷⁰⁹ yet the Brady Act seeks to delegate this executive power to state officers. “[I]f Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws,” said the Court, then the “unity [of executive authority] would be shattered, and the power of the President would be subject to reduction.”⁷¹⁰

Finally, the Court turned to its own precedent to determine how it had treated similar statutes whose constitutionality had been challenged before the

704. *Printz*, 521 U.S. at 920 (quoting *New York*, 505 U.S. at 166 (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”); *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring) (“It was the genius of [the Framers’] idea that our citizens would have two political capacities, one state and one federal, each protected by incursion from the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”)).

705. *See id.* (citing *New York*, 505 U.S. at 168-69; *Lopez*, 514 U.S. at 576-77). The Court rejected the government’s argument that the interim provisions of the Brady Act do not decrease the accountability of state or federal officers, stating that:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Id. at 930.

706. *See id.* at 921 (quoting *Gregory*, 501 U.S. at 458 (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”)).

707. *Id.* at 922.

708. *See id.*

709. *See Printz*, 521 U.S. at 922 (quoting U.S. CONST. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”)).

710. *Id.* at 923.

Court.⁷¹¹ The Court determined that its previous opinions had “made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”⁷¹² The Court relied in part on its warning in *Federal Energy Regulatory Commission v. Mississippi*⁷¹³ that ““this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.””⁷¹⁴ Furthermore, the Court noted its holding in *New York* that ““the Federal Government . . . may not compel the States to enact or administer a federal regulatory program.””⁷¹⁵

The Court rejected as irrelevant the government’s contention that the interim provisions of the Brady Act serve important law enforcement purposes, are the most efficient means of executing those purposes, and place a minimal burden on state officials for a short period of time.⁷¹⁶ The Court stated that such factors “might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments.”⁷¹⁷ But where, as in the Brady Act, the “whole *object* of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a ‘balancing’ analysis is inappropriate.”⁷¹⁸ The Court again relied on *New York* to support its rejection of the government’s proposed balancing approach⁷¹⁹ and held that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”⁷²⁰

The Court concluded that the obligations imposed upon chief law enforcement officers to ““make a reasonable effort to ascertain . . . whether

711. *See id.* at 925.

712. *Id.* (citing *Hodel*, 452 U.S. at 264; *FERC*, 456 U.S. at 742).

713. 456 U.S. 742 (1982).

714. *Printz*, 521 U.S. at 926 (quoting *FERC*, 456 U.S. at 761-62).

715. *Id.* (quoting *New York*, 505 U.S. at 188).

716. *See id.* at 932.

717. *Id.*

718. *Id.*

719. *See Printz*, 521 U.S. at 933. The Court stated:

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear ‘formalistic’ in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Id. (quoting *New York*, 505 U.S. at 187).

720. *Id.* at 935.

receipt or possession [of a handgun] would be in violation of the law” is unconstitutional.⁷²¹ The Court declined to decide, however, whether firearms dealers and prospective purchasers still are bound by the relevant provisions of the Brady Act because the Court refused to “speculate regarding the rights and obligations of parties not before the Court.”⁷²²

1. Mille Lacs Band of Chippewa Indians v. Minnesota

The Eighth Circuit first addressed *Printz* in *Mille Lacs Band of Chippewa Indians v. Minnesota*,⁷²³ in which Minnesota Chippewa Indians sought to enforce an 1837 treaty with the United States reserving to the Indians the rights to hunt, fish, and gather grains on certain land, lakes, and rivers in present-day Minnesota and Wisconsin. The Indians requested a declaratory judgment that their rights under the treaty continued to exist in Minnesota, as well as an injunction to enforce those treaty rights free of regulation by the State of Minnesota.⁷²⁴ Following years of litigation in federal court, the Indians agreed with the state to a plan resolving some of the Indians’ claims and allowing the Indians to continue hunting, fishing, and gathering subject to state regulation.⁷²⁵ Regarding the Indians’ remaining claims under the 1837 treaty, the state argued that the Indians’ treaty rights were extinguished in 1858 when “Minnesota was granted statehood and acquired the sovereign trust and police power over its natural resources,”⁷²⁶ and that enforcing the Indians’ rights under the treaty would violate Minnesota’s sovereignty in violation of *Printz*.⁷²⁷

The Eighth Circuit⁷²⁸ acknowledged “the Supreme Court’s recent opinion in *Printz v. United States*” and noted that “[i]n *Printz*, the Court struck down a portion of the Brady Act which required state officers to implement a federal regulatory program as violative of the Tenth Amendment.”⁷²⁹ The Eighth Circuit determined, however, that *Printz* was not relevant to the case *sub judice* because “[t]here is no federal law commanding state regulation . . . [and] the State voluntarily stipulated to the [agreement] regarding regulatory issues.”⁷³⁰ Furthermore, the court determined that the case before it concerned “state law infringing on rights guaranteed by federal law, and there is no question that federal courts have the power to order state officials to comply with federal

721. *Id.* at 933 (quoting § 922(s)(2)).

722. *Id.* at 935 (citing *New York*, 505 U.S. at 186-87).

723. 124 F.3d 904 (8th Cir. 1997), *aff’d*, 119 S. Ct. 1187 (1999).

724. *See Mille Lacs*, 124 F.3d at 910.

725. *See id.* at 912.

726. *Id.* at 926.

727. *See id.* at 928 n.44.

728. Judge Lay wrote for the court.

729. *Mille Lacs*, 124 F.3d at 928 n.44.

730. *Id.* at 928-29 n.44.

law.”⁷³¹ The court went on to hold that the Indians’ 1837 treaty rights were not extinguished when Minnesota was admitted into the Union and that enforcing those rights is not inconsistent with the state’s sovereignty.⁷³²

2. Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Commission

The Eighth Circuit’s next extensive discussion⁷³³ of *Printz* was *Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Commission*, a case factually related to *Concerned Citizens*.⁷³⁴ In *Central Interstate*, the State of Nebraska sought a declaratory judgment precluding the Central Interstate Low-Level Radioactive Waste Commission from establishing deadlines for the state to consider a license application for a radioactive waste facility to be located within the state. The commission was created in an interstate compact entered into pursuant to the LLRW Act⁷³⁵ and argued that it was granted authority under the compact to impose a deadline for Nebraska, a party to the compact, to process the license application. Nebraska claimed that the commission had no authority to interfere with the state’s regulatory process, and that doing so violated the state’s sovereignty under *Printz*, as well as *New York*.⁷³⁶

Although the Eighth Circuit⁷³⁷ was “cognizant that the State’s sovereign powers are potentially limited by the Compact,”⁷³⁸ it found *Printz* and *New*

731. *Id.* at 929 n.44 (citing *Printz*, 521 U.S. at 931 n.16; *Fond du Lac*, 68 F.3d at 256 n.3).

732. *See id.* at 928-29. The Supreme Court affirmed the Eighth Circuit’s disposition of the *Mille Lacs* case without mention of *Printz*. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S. Ct. 1187 (1999).

733. Before deciding the *Central Interstate* case, the court filed two opinions with only peripheral mentions of *Printz*. First, the dissent in *In re Young*, 141 F.3d at 865, referring to *Printz*, stated that “recently the [Supreme] Court reemphasized the importance of maintaining the constitutional structure and separation of powers, and reaffirmed its duty to call into check impermissible exercises of Congressional power.” The dissent also quoted *Printz* as support for the proposition that a congressional statute that violates the separation of powers doctrine is not a proper exercise of the powers of Congress, and therefore is “merely an act of usurpation which deserves to be treated as such.” *Id.* at 866 (quoting *Printz*, 521 U.S. at 924 (internal quotation omitted)). Second, in *Johnson v. Missouri*, the Eighth Circuit dismissed a lawsuit brought by Missouri prisoners for lack of standing and, quoting *Printz*, rejected the prisoners’ attempt to assert claims on behalf of third parties. 142 F.3d 1087, 1091 (8th Cir. 1998) (quoting *Printz*, 521 U.S. at 935 (“We decline to speculate regarding the rights and obligations of parties not before the Court.”)).

734. *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm’n*, 187 F.3d 982 (8th Cir. 1999) (citing *Concerned Citizens*, 970 F.2d at 77).

735. *See* 42 U.S.C. § 2021(b)-(j) (amended 1986); *see also supra* text accompanying notes 67-72 for the history and purpose of the LLRW Act.

736. *See Central Interstate*, 187 F.3d at 984, 985 n.3.

737. Judge Beam, writing for a unanimous three-judge panel.

738. *Central Interstate*, 187 F.3d at 985.

York “largely irrelevant here, except that they highlight the concerns associated with intrusion into sovereign powers.”⁷³⁹ The court determined that, “[d]espite the State’s diligent efforts to bring the principles espoused in . . . *New York v. United States* and *Printz v. United States* to bear on this case, the limited authority delegated by the Compact does not run afoul of the State’s sovereign regulatory authority.”⁷⁴⁰ The court concluded that the compact was a legally binding agreement and that its text clearly authorized the commission to set a reasonable deadline for Nebraska to process the license application.⁷⁴¹

III. CONCLUSION

Central to the large amount of commentary generated by the Supreme Court’s decisions in *New York*, *Lopez*, *Seminole Tribe*, *City of Boerne*, and *Printz* is the question whether those cases are the solution for which critics of congressional overreaching have been searching, or whether they are too narrowly tailored and fact-specific to be effectual in changing the relationship between the states and the federal government. The preceding discussion of Eighth Circuit cases applying the quintet of recent Supreme Court federalism cases offers some answers, but, as might be expected, the answer varies depending upon the case.

First, the impact of the Supreme Court’s decision in *New York*, and reaffirmation and extension of *New York* in *Printz*, has been minimal, judging by the Eighth Circuit’s rejection of claims predicated on one or both of those cases. As was made explicit by the Eighth Circuit in *Concerned Citizens*, the effect of *New York* on the federal balance of power is most obviously limited by the Court’s striking down the take-title provision of the LLRW Amendments and severing it from the remaining incentive provisions. Regarding the remaining incentive provisions, *New York* has had the effect only of reinforcing the power of Congress to attach strings to state receipt of federal money under the Spending Clause and to compel states to regulate pursuant to federal standards or face preemption under the Commerce Clause. Thus, Congress remains free to coerce the states to conform to its legislative goals, but may avoid the kind of “commandeering” prohibited by *New York* and *Printz* by the simple expedient of threatening to withhold federal funds. Indeed, the Eighth Circuit upheld both the IGRA in *Cheyenne River* and the False Claims Act in *Zissler* on similar bases.

The impact of *New York* also is stifled by the Supreme Court’s explicit avoidance of the volatile *Wirtz-Usery-Garcia* line of cases dealing with the application of the FLSA to state employers. The Court’s insistence that *New*

739. *Id.*

740. *Id.* at 987 (internal citations omitted).

741. *See id.* at 985-88.

York does not call into question the Court's previous holding in *Garcia* was not lost on the Eighth Circuit in *May*.

Finally, the Eighth Circuit's decisions in *Fond du Lac* and *Mille Lacs* emphasize the important distinction made in *New York* and *Printz* between congressional attempts to commandeer state bureaucracies and the long-recognized power of the federal courts to demand state compliance with federal law. The Supreme Court reaffirmed the authority of the federal courts to order states to comply with federal law under Article III and the Supremacy Clause, and narrowly tailored the holdings of *New York* and *Printz* to prohibit only congressional attempts to compel state legislatures to enact, and state executive officers to enforce, federal regulatory programs.

Thus, *New York* and *Printz* have had no impact in the Eighth Circuit beyond their narrow holdings striking down the take-title provision of the LLRW Amendments and the interim provisions of the Brady Act. This is most obvious in *Mille Lacs* and *Central States*, in which the Eighth Circuit suggested that the general concerns about the principle of state sovereignty expressed in *New York* and *Printz* simply are not persuasive outside the realm of direct commandeering of state legislative or executive authority by Congress.

More surprising, particularly considering the acclaim that accompanied the opinion, has been the almost complete ineffectiveness of *Lopez* as a basis for challenging federal criminal laws nominally predicated on the interstate commerce power. The Eighth Circuit cases suggest that result is due in large part to the inherent limits of *Lopez* in the face of the immense commerce power accumulated over the past sixty years.

The most far-reaching of those limits is the Supreme Court's recognition in *Lopez* that virtually any congressional legislation containing a jurisdictional element is a valid exercise of Congress' power under the Commerce Clause. The Eighth Circuit applied this rule in *Mosby*, *Rankin*, *Miller*, *Flaherty*, *Baker*, *Bausch*, and numerous other cases in that line, to sustain various criminal statutes with otherwise tenuous links to interstate commerce. Nowhere is the importance of this facet of *Lopez* more obvious than in *Danks*, in which the Eighth Circuit upheld a revised version of the very statute struck down in *Lopez*, the singular revision being Congress' addition of an interstate commerce requirement.

Similarly, the Supreme Court determined in *Lopez* that legislative findings regarding the effect of statutorily regulated activity on interstate commerce may bring a statute with no otherwise apparent connection to commerce within the purview of the Commerce Clause. Accordingly, in *Robinson*, *Monteleone*, and *McMasters*, the Eighth Circuit relied on Congress' findings regarding the effects of carjacking, gun trafficking, and arson on interstate commerce in sustaining federal statutes that regulate those activities.

That Congress may comply with *Lopez* simply by drafting a jurisdictional element or creating favorable legislative history is exacerbated by the minimal showing necessary to establish the required nexus to interstate commerce. When considering *Lopez* challenges in *Dinwiddie* and *Crawford*, for example, the Eighth Circuit relied on the “aggregate effects” test promulgated in *Wickard* and endorsed in *Lopez* to find the necessary connection between interstate commerce and activities that, when viewed in isolation, only nominally impact commerce. Similarly, in *Mosby*, *Flaherty*, *Baker*, *McMasters*, *Bausch*, and *Wright*, the court required only the slightest connection between the defendants’ conduct and interstate or foreign commerce. The court further determined in *Flaherty* that *Lopez* has nothing to say about the quantum of evidence necessary to prove a jurisdictional element, and in *Wright* the court recognized that merely crossing state lines constitutes interstate commerce for the purposes of *Lopez*.

What is more, that an interstate commerce element or congressional findings regarding interstate commerce are sufficient to bring a statute within the ambit of the Commerce Clause by no means suggests that Congress’ interstate commerce power is limited to interstate commerce. In *Brown*, *Dinwiddie*, *Monteleone*, *Baker*, and *Hall*, for example, the Eighth Circuit reaffirmed that Congress’ interstate commerce power reaches purely intrastate activity. Nor is Congress’ power to regulate commerce limited to the regulation of commercial activities. Although in *Farmer* and *Vong*, the Eighth Circuit appears to have categorically determined that *Lopez* is inapplicable to statutes regulating commercial establishments, it did not suggest that Congress may regulate *only* commercial establishments under the Commerce Clause. Indeed, in *Dinwiddie*, the court squarely determined that Congress’ power to regulate commerce is not limited to commercial entities.

The effectiveness of *Lopez* also is impaired by the Eighth Circuit’s apparent unwillingness to rigorously apply that case if the costs of doing so are the repeal of numerous criminal statutes currently on the books and turmoil in the system of commerce that has grown up around more established Commerce Clause jurisprudence. Particularly indicative of the Eighth Circuit’s apparent reluctance in this regard is the court’s reasoning in *Wright* that, if merely crossing state lines did not constitute interstate commerce, then too many existing statutes would have to be struck down for want of constitutional authority. Similarly, the Eighth Circuit’s reliance on pre-*Lopez* cases in *Brown*, *Flaherty*, and *McMasters* suggests that *Lopez* has not been the watershed many expected when it comes to interpreting statutes already sustained as proper exercises of the commerce power.

Further softening the impact of *Lopez* is the fact that the Commerce Clause is not the only authority under which Congress may prohibit conduct traditionally regulated by the states. That Congress’ options are not limited to the commerce power was made explicit by the Eighth Circuit in *Elliot*, in

which the court determined that *Lopez* was inapt because, in passing the mail fraud statute, Congress had relied upon its postal power, not the interstate commerce power. Likewise, in *Emery*, the court determined that 18 U.S.C. § 1512(a)(1)(C), prohibiting the murder of federal informants, does not derive its authority from the Commerce Clause, but from Congress' power to maintain the integrity of federal proceedings and investigations. Finally, in *Jensen and Hall* the court concluded that Congress had acted pursuant to its taxing power, not its commerce power. *Hall* is particularly interesting because, although the Eighth Circuit determined that Congress had exceeded the commerce power by prohibiting the possession of unregistered firearms in 26 U.S.C. § 5861(d), the court concluded that section 5861(d) could nonetheless be sustained as a valid exercise of the taxing power.

Thus, judging by Eighth Circuit jurisprudence, the effect of *Lopez* on the federal balance has been surprisingly minimal. *Lopez*'s ineffectiveness can, in most cases, be attributed to the inherent limitations of the Supreme Court's holding in that case, which bind the Eighth Circuit and its sister circuits. Regardless of the reasons for the almost complete lack of success of claims based on *Lopez*, the fact is *Lopez* simply has failed to fulfill the wildly optimistic prognostications of its many proponents.⁷⁴²

In contrast to *Lopez*, the bright-line rule of *Seminole Tribe* that Congress may not employ its Article I powers to abrogate the states' Eleventh Amendment immunity has been successful in keeping defendant states out of federal court. The impact of *Seminole Tribe* is most evident in *Moad*, in which the Eighth Circuit concluded that Congress could not abrogate Eleventh Amendment immunity to suit under the overtime provisions of the FLSA because that statute apparently was enacted pursuant to the Interstate Commerce Clause. On the heels of *Moad*, the court squarely determined in *Raper* that Congress did not enact the overtime provisions of the FLSA pursuant to section 5 of the Fourteenth Amendment, thereby rendering those provisions virtually unenforceable against the states in federal court.

Seminole Tribe's circumscription of Congress' power to abrogate state immunity is all the more important considering that the Eighth Circuit, in cases like *Moad* and *Santee Sioux Tribe*, has demanded an unequivocal expression of a state's intent to waive its immunity. Thus, the court has declined to circumvent *Seminole Tribe* by merely implying state waiver where it has not been expressed.

742. The Supreme Court again displayed the inherent limits of *Lopez* in its recent decision of *Reno v. Condon*, in which the Court held that the Driver's Privacy Protection Act (DPPA), regulating the states' disclosure of information submitted to their motor vehicle divisions, is a constitutional exercise of Congress' interstate commerce power. See 120 S. Ct. 666, 671 (2000). The Court also held that the DPPA does not violate the principles of *New York* and *Printz* because the statute regulates state activity, and does not compel the states to regulate their citizens. See *id.* at 672.

There are, of course, bounds to the holding of *Seminole Tribe* that constrain its effectiveness in relieving the states of the burden of defending themselves in federal court. For example, to dispel criticism that its holding would completely foreclose the federal courts to suits against the states, the Court took great pains to enumerate the circumstances in which the states remain subject to suit. Most importantly, the Court explained that the *Ex parte Young* exception to Eleventh Amendment immunity continues to apply after *Seminole Tribe*. The continued viability of *Ex parte Young* was, of course, demonstrated by the Eighth Circuit's disposition of *In re SDDS*. The Eighth Circuit also demonstrated in *Santee Sioux Tribe*, however, that it would follow the Supreme Court's lead in *Seminole Tribe* by declining to apply the *Ex parte Young* exception when it would provide broader relief than the statute *sub judice* would allow.

The *Seminole Tribe* Court also endorsed the long-standing exception to Eleventh Amendment immunity that suits brought by the United States fall outside the purview of the Eleventh Amendment. This already substantial exception to state immunity has been extended in cases like *Rodgers* and *Zissler*, in which the Eighth Circuit held that suits brought by *qui tam* relators against states in federal court are not barred by the Eleventh Amendment because the United States is the real party in interest.⁷⁴³

Yet another limitation on *Seminole Tribe*'s capacity for sheltering states from suit in federal court is the exception from the Eleventh Amendment of attorneys' fee awards. As the Eighth Circuit recognized in *Jensen* and *Weaver*, attorneys' fees are not subject to the constraints of the Eleventh Amendment and, therefore, assessing attorneys' fees against a state does not require proper abrogation of the amendment by Congress.

Finally, the Eighth Circuit somewhat moderated the effect of the *Seminole Tribe* two-part abrogation test by determining in *Crawford* that the second prong, requiring that Congress act pursuant to a valid exercise of power, is an objective requirement. That is, Congress does not have to specifically intend to exercise its section 5 enforcement power when enacting a statute abrogating state immunity; the enforcement power need only be a plausible basis for the statute.

Despite these various limitations and exceptions, *Seminole Tribe* has proven effective in preventing Congress from subjecting the states to suit in federal court. Its continued success in this regard is virtually assured by the Supreme Court's subsequent decision in *City of Boerne*, which, when combined with *Seminole Tribe*, further diminishes the states' exposure to suit

743. The Supreme Court will address this issue in the October 1999 term in *Vermont Agency of Natural Resources v. United States*, No. 98-1828, in which it will be called upon to decide whether a *qui tam* relator suing the State of Vermont is the real party in interest for the purposes of state sovereign immunity.

in federal court by narrowing the issue of congressional abrogation of Eleventh Amendment immunity to a question of the extent of Congress' power to enforce the Fourteenth Amendment.

The combination of *Seminole Tribe* and *City of Boerne* is featured most prominently in the Eighth Circuit's decisions in *Humenansky*, *Mauney*, and *Alsbrook*. In *Humenansky*, the court subjected the ADEA to the *Seminole Tribe* abrogation test and concluded that the statute failed both parts of the analysis. Congress not only failed to clearly express its intent to abrogate, it also exceeded its enforcement power, as construed in *City of Boerne*, when it enacted the ADEA.⁷⁴⁴

In *Mauney*, the court applied the *Seminole Tribe* analysis to the IDEA and concluded that Congress properly abrogated Eleventh Amendment immunity under section 5. The dissent, however, would have relied on the court's interpretation of *City of Boerne* in *Humenansky* and therefore would have found that the IDEA exceeds Congress' enforcement power. This case in particular—as well as *Autio*, in which the court en banc was evenly split regarding whether Congress properly abrogated state immunity when it enacted the ADA—highlights the apparent difference of opinion within the Eighth Circuit regarding the bounds of the enforcement power following *City of Boerne*. The disagreement turns on whether Congress has the power under section 5 to prohibit conduct that does not violate the substantive sections of the Fourteenth Amendment, as interpreted by the Supreme Court.

The court likely settled this issue, however, in its en banc decision of *Alsbrook*. There, the court, reversing the panel opinion, rigorously applied *City of Boerne* to strike down the provisions of the ADA that seek to enforce against the states rights that the Supreme Court has not found to be guaranteed by the Fourteenth Amendment.

Beyond its effectiveness in constricting the second prong of the *Seminole Tribe* analysis, the narrow holding of *City of Boerne* striking down the RFRA has had the immediate effect in Eighth Circuit cases like *Montano* of rendering pending RFRA claims no longer viable. As made explicit in *In re Young*, however, *City of Boerne* disposes of the RFRA only to the extent that the statute applies to state law. Thus, the RFRA continues to provide private plaintiffs the right to sue the federal government for violations of the substantive provisions of the statute. Oddly enough, this limitation of *City of Boerne*'s holding means that the federal government is held to a more rigorous standard regarding religious freedom than are the states.

744. Subsequent to the Eighth Circuit's decision of *Humenasky*, the Supreme Court considered the issue of Congress' abrogation of Eleventh Amendment immunity in the ADEA in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000). The Court concluded that the ADEA contains a clear statement of Congress' intent to abrogate the states' immunity, but that the abrogation exceeded Congress' § 5 enforcement power. *See id.* at 642, 650.

The impact of *City of Boerne* also may have been impaired to some extent by the Eighth Circuit's suggestion in *Mauney*, and to a lesser extent *In re Young*, that *City of Boerne* is a fact-intensive case standing for the unremarkable proposition that Congress may not overturn the Supreme Court's interpretation of substantive constitutional rights. The *Mauney* court further suggested that, rather than limit Congress' power under section 5, *City of Boerne* confirmed the broad scope of the enforcement power. The *Mauney* court's interpretation of *City of Boerne* is dubious, however, considering the Eighth Circuit's en banc decision of *Alsbrook*, as well as the Supreme Court's latest forays into this area.⁷⁴⁵ In a trilogy of cases handed down last term, the Court continued down the path begun with *Seminole Tribe* and *City of Boerne*, making it all the more likely that those cases, already clearly the most influential of the five Supreme Court cases, will continue to have a profound mediating effect on congressional attempts to subject the states to suit in federal court.

In sum, it appears from the Eighth Circuit's application of *New York*, *Lopez*, *Seminole Tribe*, *City of Boerne*, and *Printz* that the capacity of those cases for shifting the federal balance of power in favor of the states is a mixed bag. *New York* and *Printz* have had little effect outside the marginal realm of statutes directly commandeering state legislatures and executives, and *Lopez* appears very nearly to be limited to its facts. The relatively clear rules of *Seminole Tribe* and *City of Boerne*, however, have greatly impaired Congress' ability to subject states to private causes of action in federal court and, judging by the most recent Eighth Circuit and Supreme Court decisions, will continue to do so into the immediate future.

745. See *supra* note 36.

